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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

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SUPREME COURT OF WASHINGTON
DURING THE PERIOD COVERED IN THIS VOLUME

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ERRATA

Page 169, line 11: for § 5274 read § 5247
Page 352, line 2 from bottom: for § 1 read § 3
Page 586, 1st syllabus: for § 4828 read 4825
Page 618, 3d syllabus: for many read may

ERRORS NOTED IN PREVIOUS VOLUMES

VOLUME 41

Page 443, line 13 from bottom: for § 6060 read § 5060

VOLUME 43

Page 116, 1st syllabus, 5th line, for 1905 read 1903
Page 185, line 10 from top: for 1905 read 1904
Page 655, 1st syllabus: transpose line 4 after line 6



CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 6235. Decided September 22, 1906.]

MARY F. BROWN, *in Her Own Behalf and as Guardian Ad
Litem for Bessie Brown et al., Appellant*, v. NORTHERN
PACIFIC RAILWAY COMPANY *et al., Respondents*.¹

MASTER AND SERVANT—COLLISION OF TRAINS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for the death of a locomotive engineer, killed in a collision, within terminal grounds, the evidence conclusively establishes the contributory negligence of the deceased, so that there is no room for difference of opinion in the minds of reasonable men, and the case is properly taken from the jury, where it appears that deceased was in the sole charge of his train and the brakes, and familiar with the location, and required to know the rule that all trains must approach and pass through the yards "under full control," i. e., so as to be able to stop within vision, and that he collided with the engine in the terminal grounds, while day was breaking, and while going at the rate of at least eight miles an hour, the distance of unobstructed view being seven hundred feet, and that his failure to observe the rules directly contributed to his injury; as disobedience of rules contributing to the injury conclusively establishes negligence.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be assigned upon the allowance of an amendment of an answer interposing the defense of the negligence of a fellow servant, where the case was withdrawn from the jury solely upon the ground of defendant's contributory negligence, which was pleaded before trial.

APPEAL—REVIEW—HARMLESS ERROR—REMARKS OF COUNSEL. It will not be assumed that improper remarks of counsel made in the absence of the jury, upon the argument of a motion for a nonsuit,

¹Reported in 86 Pac. 1053.

improperly influenced the trial court, where the record does not show that fact, and where the nonsuit was properly granted upon the evidence.

COURTS—POWER TO CORRECT FORMER RULING. It is not beyond the power of a trial court to reverse its ruling denying a motion for a nonsuit, where immediately after the oral announcement extensive arguments followed, and no judgment or formal order was made, the motion having at first been considered as merely formal.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered July 29, 1905, in favor of the defendants, upon sustaining a challenge to the evidence at the close of plaintiff's case, dismissing an action for damages for the death of a railroad engineer killed in a collision. Affirmed.

Barnes & Latimer, for appellant. Contributory negligence is always a question for the jury, except in rare cases, and such cases must be where the minds of men could not reasonably differ. 1 Shearman and Redfield, Law of Negligence, § 114; *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Ladouceur v. Northern Pacific R. Co.*, 4 Wash. 38, 29 Pac. 942; *Steele v. Northern Pacific R. Co.*, 21 Wash. 287, 57 Pac. 820; *Burian v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. Inference of care arises in favor of one deceased, from the instinct of self-preservation. 1 Shearman and Redfield, Law of Negligence, § 111. The question of due care is one of fact under the circumstances surrounding the party at the time of the accident. *Steele v. Northern Pacific R. Co.*, 21 Wash. 287, 57 Pac. 820; *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79; *Chicago etc. R. Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, 88 Am. St. 161; 4 Current Law, pp. 598-601; *Louisville etc. R. Co. v. East Tennessee etc. R. Co.*, 60 Fed. 993.

Edward J. Cannon, and *Sullivan, Nuzum & Nuzum*, for respondents. The allowing of amendments is discretionary and will not be disturbed except for apparent abuse thereof.

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Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Hanson v. Michelson*, 19 Wis. 525; *Connalley v. Peck*, 3 Cal. 75; *Thorn v. Smith*, 71 Wis. 18; *Garrison v. Goodale*, 23 Ore. 307, 31 Pac. 709; 1 Ency. Plead. & Prac. p. 524, note 4; *Skagit R. Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077. There was sufficient evidence of contributory negligence, and the nonsuit was properly granted. *Patton v. Texas etc. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Schofield v. Chicago etc. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *New York etc. R. Co. v. Diefendaffer*, 125 Fed. 893; *Dunworth v. Grand Trunk Western R. Co.*, 127 Fed. 307; *Steeple v. Panel & Folding Box Co.*, 33 Wash. 359, 74 Pac. 475; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Johnson v. Anderson etc. Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Woods v. Northern Pacific R. Co.*, 36 Wash. 658, 79 Pac. 309. An employee is bound to obey all the reasonable rules of his employer with reference to the conduct of his business. *Nordquist v. Great Northern R. Co.*, 89 Minn. 485, 95 N. W. 322; *Green v. Brainerd etc. R. Co.*, 85 Minn. 318, 88 N. W. 974; *Gordy v. New York etc. R. Co.*, 75 Md. 297, 23 Atl. 607, 32 Am. St. 391; *Connors v. Burlington etc. R. Co.*, 74 Iowa 383, 37 N. W. 966; *Ford v. Chicago etc. R. Co.*, 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657.

HADLEY, J.—This is an action to recover damages for the death of William A. Brown. The suit was brought by Mary E. Brown, the surviving wife of the deceased, in her own behalf, and also as guardian *ad litem* in behalf of the minor children of herself and deceased. The Northern Pacific Railway Company, Edward Bosworth and Alex. Walker were made parties defendant. Brown met his death in a railway collision on the Northern Pacific line, and Bosworth and Walker were respectively the conductor and engineer of

the train with which Brown's train collided. The complaint charges negligence against all of the defendants. The answers put in issue the essential allegations of the complaint, and interposed the defense of contributory negligence. At the trial certain amendments to the answers were permitted, which need not be explained at this time. The cause came on for trial before a jury and, at the close of the testimony submitted by the plaintiff, the defendants challenged the sufficiency of the evidence to sustain a verdict for the plaintiff, and moved that the cause be withdrawn from the jury and judgment entered in favor of the defendants. The motions were granted on the ground that the evidence conclusively showed contributory negligence on the part of the deceased. Judgment was accordingly entered, and the plaintiff has appealed.

The principal question involved is that of contributory negligence, and it is assigned that the court erred in sustaining the challenge to appellant's evidence, and in taking the case from the jury. The evidence discloses the following facts: At the time of the accident, the deceased was the head engineer in charge of an extra freight train, known as "No. Extra 68." The train was being drawn by a small standard engine in charge of deceased, and also by a large consolidated engine immediately behind the small one, which was in charge of another engineer. The deceased had charge of the air, and was in sole control of the train. This train had proceeded from Hope, Idaho, to Trout Creek, Montana, where the accident occurred. At Hope the deceased's train was passed by regular freight train No. 54, which was going in the same direction, and which proceeded to Trout Creek under orders, where it arrived at 2 a. m. At Trout Creek the crew of No. 54 were under orders to make more track room in the yards, by moving cars from one track to another, and they were so engaged when the collision occurred. Some ten or fifteen minutes after No. 54 left Hope, the deceased's train followed it to Trout Creek, and it was while this train

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was running through the yards at the latter place at 2:30 a. m. that the accident occurred. The engine of No. 54 was at the time engaged in drawing cars from a sidetrack out upon the main line, preparatory to replacing them upon sidetracks so as to make more yard room. The head of the engine was toward the cars that were moving, and the engine was drawing the cars after it as it moved backward with its rear or tender toward the west, from which direction the deceased's train came. As the latter train approached from the west, its head engine in charge of the deceased struck the tender of the engine engaged in switching, and as a result of the collision the deceased lost his life.

Trout Creek was a terminal on the railway line, so called because it was the end of a division of the road, and extensive yards and sidetracks were there provided for terminal purposes. The deceased had been on this run for some time, and was therefore aware that the train was approaching, and running through, terminal yards. As an engineer he was required to be conversant with the rules of the railway under which all engineers and trainmen operated. One of these rules provides that all trains must approach and pass through yards under full control. According to the testimony of plaintiff's witnesses, "under full control" means that the train must be regulated at such speed as will enable the engineer to stop it within his vision, no matter how short a space that may be. One witness expressed the meaning of the rule as follows: "If I can stop in going twenty miles an hour in plenty of time, or be able to stop in ten feet if I had to." It was also testified that the engineers of extra trains are, at any time of day or night, charged with knowledge that there is liable to be an obstruction upon the main line within terminal yards, and that when an engineer is approaching any place where he thinks, or has reason to know, that there may be an obstruction on the main line, it is his duty to arrange his speed in accordance with the distance of his vision.

Fairly stated, the evidence shows the speed of deceased's

train at the time of the accident to have been at least eight miles an hour, and the distance of unobstructed view before reaching the scene of the accident about seven hundred feet. The time was 2:30 a. m. on the 13th of June, and the location was an elevated one in the mountains. Day was beginning to break, and although it was not yet fully light there was some daylight. There was some testimony that the train on its way had passed through banks of fog, but it does not appear that there was more than a very slight fog in the yards at the time. The location was a mile from the river along which the fogs usually hung, and it was also some distance from the hills around. Witnesses testified that they saw no lights upon the rear of the engine which was struck by the engine in charge of the deceased. The evidence upon that subject was merely negative in its character, as no witness testified positively that there were no such lights. Their observation in that regard was after the collision, which had disarranged the entire rear part of the engine. The collision was of such force that it practically destroyed the engine on which the deceased was riding. The brakes and couplings of the train were in good repair and were operating properly at the time. These were under full control of the deceased as the head engineer. The engineer of the second engine had no control of the air brakes, they being placed entirely under control of the head engineer.

Under the evidence submitted by appellant, we see no escape from the conclusion that the deceased violated the established rules as to the speed of his train at the place of the accident, and that the collision would not have occurred but for his neglect. He was familiar with the location and character of the place and, as an engineer, he was bound to know that the main track within these terminal grounds was liable to be obstructed at any time of the day or night. Knowing this, it was his duty to observe the established rules and to so control the speed of his train as he approached these grounds, and when within their limits, that he could stop it at

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any point within the range of his vision. It is manifest from the evidence that he did not so control it, although it was within his power so to do, and that his failure to do so contributed directly to his injury and death. An employee is bound to obey all of the reasonable rules and instructions of his employer with reference to the conduct of his business.

"Disobedience of such rules, if it contributes directly to the injury of the employee, conclusively charges him with negligence, which will bar any recovery of damages for his injury. *Green v. Brainerd & N. M. Ry. Co.*, 85 Minn. 318, 88 N. W. 974. This rule is based upon the plainest principles of justice and sound public policy, for upon a prompt compliance with such rules, especially in the railway service, depends the safety of not only property, but of human life and limb." *Nordquist v. Great Northern R. Co.*, 89 Minn. 485, 95 N. W. 322.

See, also, *Gordy v. New York etc. R. Co.*, 75 Md. 297, 23 Atl. 607; *Conners v. Burlington etc. R. Co.*, 74 Iowa 383, 37 N. W. 966; *Ford v. Chicago etc. R. Co.*, 91 Iowa 179, 59 N. W. 5, 24 L. R. A. 657 and note.

Appellant, however, contends that the question of contributory negligence was for the jury. This court has frequently held that it is ordinarily for the jury, but it has also uniformly adhered to the doctrine that when there is no room for difference of opinion in the minds of reasonable men as to the existence of contributory negligence, it is the duty of the court to decide, as a matter of law, that such negligence exists, and to take the case from the jury. We think this is such a case, and that the court did not err in withdrawing the case from the jury within the following decisions of this court: *Johnson v. Anderson etc. Lum. Co.*, 31 Wash. 554, 72 Pac. 107; *Steeple v. Panel etc. Box Co.*, 33 Wash. 359, 74 Pac. 475; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981.

It is assigned that the court erred in permitting the respondents to amend their answers during the trial so as to interpose the defense of assumption of risk, and also in per-

mitting the respondent railway company to further amend by interposing the defense that the deceased met his death by reason of the act of a fellow servant. The court, however, determined the case solely upon the ground of contributory negligence, which was a defense in the pleadings before the trial began and was therefore regularly before the court at the time appellant's testimony was submitted. No evidence was submitted under these new defenses, and no question arising therefrom was determined against appellant. Appellant was not prejudiced by the amendments, in view of the fact that the case was determined entirely with reference to another defense, which alone has been considered by this court.

Error is assigned upon the alleged misconduct of Mr. Bunn, who was counsel for respondent Northern Pacific Railway Company at the trial. The misconduct charged consisted in the following remark made by said counsel to the court during the argument on motion for nonsuit:

"I want to say here that this is the second time in ten years where I have been in court to defend just such a similar case, and if the result of this case is as it must be, if the court will sustain my motion now or hereafter, I shall do my best, and I promise in the presence of my Maker to take care of her and her children for the rest of their life, and I have yet to have a recommendation in such a matter turned down at the St. Paul office."

The remark was not made in the presence of the jury, the jury having withdrawn during the argument on the motion, and, in any event, the cause was not submitted to the jury. It is suggested, however, that the remark may have influenced the court to grant a nonsuit. The record does not show such to be the fact, and this court will not assume that a trial court has been improperly influenced by remarks of counsel. It is true, the remark was improper and should not have been made. If it had been made before a jury that afterwards passed upon the facts, a serious question of error might have arisen. The trial court determined the case upon the same evidence which has been reviewed by this court, and it has

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been determined here as well as below upon appellant's evidence and not upon the remarks of counsel. Further argument upon this subject, made by appellant in connection with the next assignment of error, we shall mention below.

It is contended that the court reversed its own ruling upon the motion for nonsuit, that it erred in so doing, and that the result may have been induced by the remark of counsel above discussed, the remark having been made after the first ruling and before the last. So far as any effect of counsel's remark upon the mind of the court is concerned, what we have said before sufficiently disposes of that subject. With reference to the ruling upon the motion for nonsuit, the record does show that immediately after the formal motion was made, the court announced that the motion would be denied. This was immediately followed, however, by extensive arguments upon the motion by counsel upon both sides, the arguments appearing in the record. At the conclusion of the arguments, the court granted the nonsuit and discharged the jury. When its former announcement was called to the attention of the court, it remarked that it at first believed that the motion was merely formal, and for that reason the announcement was promptly made. The court did not err in its last ruling. After hearing the arguments of counsel, it was the duty of the court to consider the evidence as reviewed by counsel and, if it was convinced that a new trial would have to be granted if a verdict should be returned for appellant, it was its duty to grant the nonsuit. There was no judgment set aside. The court simply changed its mind as to the correctness of a mere oral announcement it had hurriedly made during the progress of the trial. If courts should not be permitted to correct such mistakes during a trial, before they have become merged into some formal order or judgment, useless protraction of litigation and unnecessary expense would result.

We find no reversible error, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, DUNBAR, and CROW, JJ., concur.

[No. 6064. Decided September 23, 1906.]

BANK OF MONTREAL, *Respondent*, v. R. J. HOWARD *et al.*,
Appellants.¹

BILLS AND NOTES — DELIVERY — ACTIONS — DEFENSES — FRAUD — ESTOPPEL. Where a note was executed by defendants for advances received, who at the same time executed an option upon a mine to the payee of the note, with a deed, all delivered in escrow to be held until the expiration of the option, when the note was to be returned to the purchaser, and the deed to the defendants, if the option was not exercised, the defendants, upon demanding and receiving back the deed at the expiration of the option, are estopped to claim fraud or nondelivery of the note in the hands of an innocent purchaser, never having made any such claim theretofore.

NEW TRIAL—DISCRETION OF COURT—MERITORIOUS DEFENSE. The discretion of the court in denying a continuance will not be interfered with where it appears that there is no defense, legal or equitable, to the action.

PLEDGES—NOTE HELD AS COLLATERAL—ENFORCEMENT—AMOUNT OF RECOVERY. In an action upon a note of \$3,363, held as security for a note of \$3,000, the pledgee is not a party in interest beyond the amount due on the latter note, and judgment for the amount of the former note is erroneous.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered September 14, 1905, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on a promissory note. Modified.

O. C. Moore, for appellants. The respondent bank, on the receipt of the note in escrow, became the agent and trustee of the appellants, for the preservation and ultimate delivery of the note. *Mechanics' Nat. Bank v. Roughead*, 76 App. Div. 534, 78 N. Y. Supp. 800; *Lewis v. Prather*, 14 Ky. Law 749, 21 S. W. 538; *Humphreys v. Richmond etc. R. Co.*, 88 Va. 431, 13 S. E. 895; *Fred v. Fred* (N. J. Eq.), 50 Atl. 776; *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958; *Davis v.*

¹Reported in 86 Pac. 1115.

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Citations of Counsel.

Clark, 58 Kan. 100, 48 Pac. 563; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499. Transactions whereby agents obtain interests antagonistic to their principals are constructively fraudulent. *Mechem, Agency*, §§ 455, 456; *Perry, Trusts* (4th ed.), § 206; *Pomeroy, Equity Jurisprudence*, § 958; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; *Trice v. Comstock*, 121 Fed. 620, 61 L. R. A. 181; *Van Epps v. Van Epps*, 9 Paige 237; *Gerry v. Bismark Bank*, 19 Mont. 191, 47 Pac. 810; *Dormitzer v. German Sav. & Loan Society*, 23 Wash. 132, 62 Pac. 862; *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112; *Security Sav. Soc. v. Cohalan*, 31 Wash. 266, 71 Pac. 1020; *Smith v. Pacific Vinegar etc. Works*, 145 Cal. 352, 78 Pac. 550, 104 Am. St. 42. Equitable injunction will issue restraining the payee from negotiating a note induced by fraud. *High, Injunction* (4th ed.), § 1123; *Ritterhoff v. Puget Sound Nat. Bank*, 37 Wash. 76, 79 Pac. 601, 107 Am. St. 791. The note was never delivered to the payee. *Laws 1899*, p. 340, §§ 15, 16; *Pierce's Code*, §§ 6583, 6584; 7 Cyc. 683, 685.

Graves, Kizer & Graves, for respondent, *inter alia*, contended, that an escrow takes effect when the required condition is performed, without any delivery. 16 Cyc. 588; 1 *Daniel, Negotiable Inst.*, § 68; 11 *Am. & Eng. Ency. Law* (2d ed.), pp. 345, 346; *Pierce's Code*, 1905, § 6759. There was no evidence of duress. *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Feller v. Green*, 26 Mich. 70; 9 Cyc. 443; *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269; *Harmon v. Harmon*, 61 Me. 227; *Town Council v. Burnett*, 34 Ala. 400; *Buchanan v. Sahlein*, 9 Mo. App. 522; *Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134; *First Nat. Bank v. Sargeant*, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; *Preston v. Boston*, 12 Pick 7; *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321; *Knapp v. Hyde*, 60 Barb. 80. Mere general indefinite threats of arrest or imprisonment will not constitute duress. 9 Cyc. 446; *James v. Dalbey*, 107 Iowa 463, 78 N. W. 51; *Kruschke*

v. Stefan, 83 Wis. 373, 53 N. W. 679; *Post v. Bank*, 138 Ill. 559, 28 N. E. 978. Duress cannot consist in threats to arrest a person upon a charge that is true. *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803; *Delta County Bank v. McGranahan*, 37 Wash. 307, 79 Pac. 796; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. 1102; *Landa v. Obert*, 45 Tex. 539; *Beath v. Chapoton*, 115 Mich. 506, 73 N. W. 806; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 30 Am. St. 335; *Philips v. Henry*, 160 Pa. St. 24, 28 Atl. 477, 40 Am. St. 706; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76.

DUNBAR, J.—Action upon a promissory note alleged to have been executed and delivered by the defendants Howard and Kincaid to the defendant Lawry, and indorsed by him to plaintiff. Howard and Kincaid answered jointly, admitting the signing of the note, but alleged as affirmative defenses want of consideration, duress, nondelivery, and that the note was held by the plaintiff merely as collateral security for the payment of a debt of \$3,000 owing to it by Lawry. Lawry answered separately, but, inasmuch as he has not appealed from the judgment, his answer is not material. The case was tried to the court without a jury, and judgment was rendered in plaintiff's favor for the full amount of the note. Howard and Kincaid appeal.

It seems that Lawry had advanced to Kincaid \$3,363, used in developing certain mining properties in which Kincaid and Howard were jointly interested. Lawry wished to secure an option for the purchase of the mines; also desired the repayment of the money. After some little negotiation, an agreement was reached by which an option for the purchase of the mines for \$85,000 was granted Lawry, and Howard and Kincaid agreed to give to Lawry, for the \$3,363 advanced by him, a note for that amount, and that the note together with a deed for the mines was to be placed in escrow with the respondent bank. The escrow agreement provided that by January 1, 1904, Lawry should pay the respondent or

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Howard and Kincaid the sum of \$85,000, the deed was to be delivered to him, and the note was to be returned to them. If he did not do so, the deed was to be returned to them, and the note was to be delivered to him. Lawry did not pay them the money, and on January 16, 1904, he borrowed \$3,000 from the respondent and indorsed to it the note in suit as a collateral therefor. In April, 1904, Howard and Kincaid demanded the return of the deed because Lawry had not taken up his option, and respondent returned the deed to them.

Many legal questions are discussed at length by appellants, but under the testimony in this case they do not seem to us to be applicable, there being no facts to sustain them. There is not sufficient proof in the record to show the extension of time claimed by the appellants to have been made with reference to the escrow agreement, nor do we think that the lack of proof in that regard was obviated by the statement which was made by the counsel for the respondent in his opening address. The court found, and was justified by the testimony in such finding, that the note made by Howard and Kincaid was executed freely and voluntarily by both of them, and without duress, fear, or fraud being practiced upon either of them. It appears from the testimony that the bank, respondent here, was never notified by either of the appellants that any fraud in executing the note was charged, and when the time expired the appellants went to the bank and got the deed according to the agreement. The question of whether or not there was a technical delivery to Lawry of the note is not important. It was delivered to him under the agreement, and the appellants recognized that agreement and benefited by it by demanding and obtaining possession of the documents that they were entitled to under said agreement.

We are not inclined to interfere with the ruling of the court in denying a continuance. It seems to us from the record in the case, which is comparatively short, that there is no defense to this action, either equitable or legal. There

is one proposition, however, if we understand the record correctly, upon which the court erred, and that is as to the amount of the judgment. As we understand the proof in this case, there is no claim on the part of the respondent bank that it has any interest in this note sued upon except such interest as it has in it as security for the loan of \$3,000 made by it to Lawry, and when it subjects it to the use and purpose for which it was intended, viz., securing the debt of \$3,000, its rights in the note terminate. It is not a party in interest beyond that amount, and there is no reason that we can conceive of why it should be entitled to a judgment for the remainder of the note.

The judgment will therefore have to be modified to that extent, and the court is instructed to reduce the judgment by the amount of \$363, the excess of the note over the debt for which it was pledged as collateral. The appellants will be adjudged costs in this court.

MOUNT, C. J., FULLERTON, HADLEY, and CROW, JJ., concur.

[No. 6158. Decided September 24, 1906.]

THOMAS BERG, *Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS. The motorman and conductor on a street car are fellow servants of the motorman and conductor on another car of the same line going in the opposite direction, so that one cannot recover for injuries received in a collision through the neglect of the other to turn on the lights of a block system on entering the block, where it appears that the line was a single track line twelve miles long, with but a few cars in service, that the motormen were constantly meeting on schedule time fixed by the company and their duties were co-ordinate, so that they necessarily knew the character, habits, and capacity of each other, and so had opportunity of exercising mutual influence upon one another.

¹Reported in 87 Pac. 34.

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Citations of Counsel.

SAME—NEGLIGENCE OF MASTER—APPLIANCES—STREET RAILWAY BLOCK SYSTEM. A charge of negligence, made by a motorman against a street railway company for not maintaining a sufficient block system, is not sustained where the plaintiff testified that the collision would not have occurred if the motorman on the other car had obeyed the rules to turn on his lights before entering the block, and where the plaintiff had worked on the system for eighteen months and made no complaint of the system.

FULLETON, HADLEY, and DUNBAR, JJ., dissenting.

Appeal from a judgment of the superior court for King county, Hatch, J., entered December 22, 1905, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by a motorman in a collision on a street railway. Reversed.

John P. Hartman, for appellant. The duty of the master to furnish a safe place is not an absolute one, but depends upon the character of the employment and the servant's appreciation of the risk. *Miller v. Moran Bros.*, 39 Wash. 631, 81 Pac. 1089. The duty of employing servants who are never negligent is no more absolute than is the duty of furnishing a safe place. *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. An employee in entering the employ of a railway company voluntarily undertakes the risk of injury from the negligence of others who are engaged with him in the service. *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Michigan etc. R. Co. v. Dolan*, 32 Mich 510; *Grim v. Olympia Light & Power Co.*, 42 Wash. 119, 84 Pac. 635. The act of turning on the signal lights was a detail of the employment, and the giving of signals has always been held to be a detail of the work. 2 Labatt, Master & Servant, § 607; *Grattis v. Kansas City etc. R. Co.*, 153 Mo. 380, 55 S. W. 108, 77 Am. St. 721, 48 L. R. A. 399; *Stevick v. Northern Pacific R. Co.*, 39 Wash. 501, 81 Pac. 999; *Miller v. Southern Pac. R. Co.*, 20 Ore. 285, 26 Pac. 70; *St. Louis etc. R. Co. v. Needham*, 63 Fed. 107. The disobedience of rules was an

act of negligence of fellow servants, for which the master is not liable. 2 Labatt, Master & Servant, par. 608.

Martin J. Lund (Walter S. Fulton, of counsel), for respondent, contended, among other things, that the fellow-servant doctrine ought not to be extended. 2 Labatt, Master & Servant, pp. 1235, 1324; Whittaker's Smith, Negligence, 138; Shearman & Redfield, Negligence (4th ed.), 303; *Gregory v. Hill*, 8 Scots Rev. Rep. (3d series) 413; *Little Miami R. Co. v. Stevens*, 20 Ohio 416; *Burke v. Norwich etc. R. Co.*, 34 Conn. 474; *Parker v. Hannibal etc. R. Co.*, 109 Mo. 362, 19 S. W. 1119, 18 L. R. A. 802. The doctrine applies in this state only where the injured servant, either by commission or omission, contributed to the injury. *Hammarberg v. St. Paul etc. Lum. Co.*, 19 Wash. 537, 53 Pac. 727. The motormen were not fellow servants. *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Bateman v. Peninsular R. Co.*, 20 Wash. 133, 54 Pac. 996; *Uren v. Golden Tunnel Mining Co.*, 24 Wash. 261, 64 Pac. 174; *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365; *Howe v. Northern Pacific R. Co.*, 30 Wash. 569, 70 Pac. 1100; *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932; *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, 8 S. W. 691, 12 Am. St. 480; *Louisville R. Co. v. Craven's Adm'r*, 9 Bush. (Ky.) 566; *Louisville etc. R. Co. v. Edmund's Adm'r*, 23 Ky. Law 1049, 64 S. W. 727; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224; *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *Myrberg v. Baltimore etc. Min. Co.*, 25 Wash. 364, 65 Pac. 539; *Allend v. Spokane Falls etc. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Goldthorpe v. Clark-Nickerson Lum. Co.*, 31 Wash. 467, 71 Pac. 1091; *Bailey v. Cascade Timber Co.*, 32 Wash. 319, 73 Pac. 385; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665; *Mor-*

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risson v. Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064; *Hammarberg v. St. Paul etc. Lum. Co.*, 19 Wash. 537, 53 Pac. 727; *Chicago City R. Co. v. Leach*, 208 Ill. 198, 70 N. E. 222, 100 Am. St. 216; *Sams v. St. Louis etc. R. Co.*, 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475. The block system was not reasonably safe, or as safe as the double block system, and its use was a failure of the defendant to furnish reasonably safe appliances. 1 Labatt, Master & Servant, 628; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686, 84 S. W. 161; *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932; *Pearson v. Federal Min. etc. Co.*, 42 Wash. 90, 84 Pac. 632; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191.

MOUNT, C. J.—Action for personal injuries. Plaintiff recovered a judgment for \$5,000. Defendant appeals.

The appellant operated a line of electric street railway between Seattle and Renton, a distance of twelve miles. The line consisted of a single track, with numerous switches and sidetracks or turnouts. There were but two through cars between Seattle and Renton. There were four or five local cars running between Seattle and Rainier Beach, which was a station some eight miles out of Seattle. The respondent was employed as a motorman on one of the through cars. These two through cars were called express cars by reason of the fact that they were not required to stop at all of the stations and street crossings, and because it was the duty of the local cars, which stopped at each street crossing, to turn out on the sidings in order that the through cars might pass them. All the cars ran on schedules fixed by the railway company. The railway company had constructed a block-light system, known as a single block system, between Norman street and Lane street in the city of Seattle. The distance between these two

streets was sixteen hundred and sixty-five feet. There were sidings at Norman street and at Lane street, but none between these points. The grade was not level, but the railway line was straight between these points, so that a car could be seen in the daytime from one end of the block system to the other, except in foggy weather. Norman street was further south from Seattle than Lane street. Renton was in a southerly direction from Seattle.

The block-light system consisted of five poles about equal distance apart, one pole being at Lane street, one at Norman street, and the other three between those two extremes. On each of these poles were two red incandescent electric lights. When the lights were turned on at Norman street by means of a rope or lever, one red light burned on the north side of each pole through to Lane street. When the lights were turned on at Lane street, they burned on the south side of each pole through to Norman street. The lights could be turned off only at the point where they were turned on. These lights were for use in the nighttime and in foggy weather. The motormen on all cars were required to turn on the lights when entering the block, and the next car back was required to turn the lights off. It was the duty of conductors to see that the motormen turned the lights on and off. On the morning of October 25, 1904, respondent, as motorman on his car, left Renton for Seattle. When he arrived at Norman street he says he was a little late, a minute or two. The morning was very foggy. He found the lights turned to the north, indicating that a car was preceding him through the block. The lights were not burning to the south. The conductor on respondent's car told respondent to proceed through the block. Respondent thereupon proceeded at the rate of about eight miles per hour and, at about the middle of the block, after he had gone a distance of eight hundred and seventy feet, he collided with a car coming south, and was severely injured. The motorman on the southbound car had neglected to turn on his lights south, and had proceeded

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with those lights not burning. Respondent stated that, if these lights had been thrown on, he would have seen them and the accident could not have happened. The motorman on the southbound car testified that he did not turn his lights on because the conductor on the car preceding respondent's car had just come through the block and changed to the car southbound, and said that the north lights were his lights thrown on by him as he had just come through the block.

There was dispute at the trial as to what the rules of the company were with regard to the use of the lights, the company claiming that the motormen were prohibited from passing a burning light which such motorman himself had not turned on, while respondent's evidence was to the effect that motormen were only prohibited from running on lights pointing against the way his car was going. We must assume, for the purposes of this case, that the rule of the company was as stated by the plaintiff. The question is then squarely presented, whether the failure of the conductor and motorman, whose duty it was to turn the lights on, which they neglected to do, rendered the company liable to the respondent. In other words, were the motorman and conductor on the one car fellow servants of the motorman and conductor on the other car?

It seems to us that there can be no escape from the conclusion that they were fellow servants. They were each engaged in the same common employment, meeting and passing each other frequently and associating together every day. This case cannot be distinguished from the case of *Grim v. Olympia Light etc. Co.*, 42 Wash. 119, 84 Pac. 635, except in immaterial particulars. It is true, in the *Grim* case there was no fixed schedule of running time, and the motormen themselves arranged the places of meeting; and it is also true there were no conductors in the *Grim* case, and that the motormen had sole charge of their cars. These are the only facts in which the *Grim* case differs from this case in the point at issue. The fact that there was no fixed schedule was

one of the facts which was claimed as negligence of the company in the *Grim* case. But, under the circumstances of that case, no fixed time was practicable or could be established. In this case there was a fixed schedule for all cars, and it is not claimed that the motormen were incompetent or inexperienced or that they did not know the time schedule for each car. The number of cars was not great and the motormen and conductors were required to know, and did know, the schedule time of each car. So the fact that there was a schedule was in favor of the appellant and not against it. While there was a conductor in charge of each car in this case, the conductor's authority over the motorman extended only to starting and stopping of the cars and in collecting fares. In regard to the speed of the car, the handling of the lights, and meeting cars and the like, the duties of the motormen and conductors were coordinate. It is conceded that it was the duty of the motorman, when he entered the block, to turn on the light without any order from the conductor. But it was the duty of the conductor to notice the light and see that the motorman did his duty in that respect. If one was negligent, both were. There is, therefore, no question of superior servant in regard to turning on the light, which is conceded to have been the act of negligence which caused the collision and injury.

In *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, we held that a brakeman was not a fellow servant with a conductor on his train, because in that case the brakeman was subordinate to the conductor and was not required to place signals except upon orders of the conductor. In that case the superior servant doctrine was therefore applicable and was sustained. In *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932, we held that a signalman was not a fellow servant with the engineer of a logging engine, where the master had furnished no means of communication from the engineer to the signalman. That case can have no controlling influence in this case, because here the master had

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provided means of communication which was sufficient for the purpose and which appliance was not used by either servant. In the case of *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32, this court held that a conductor and engineer on a railway train were not fellow servants with employees on a work train, but this rule had not been applied to street railway cases. The reasons therefor are given in *Grim v. Olympia Light etc. Co.*, *supra*. A large number of cases are cited where we have permitted one servant to recover from the master by reason of negligence of another servant. But those have been cases where the negligence was the omission of some positive duty of the master. It is unnecessary for us to cite these cases here, or to review them at length for, in such cases as well as cases not cited, we have uniformly recognized the rule that the master is not liable for injuries resulting to a servant by the negligence of a fellow servant. *Millett v. Puget Sound etc. Works*, 37 Wash. 438, 79 Pac. 980; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999.

The questions usually presented have been whether the facts in particular cases bring the injured party within the rule of fellow servant. In determining who were fellow servants we have said that servants must not only be engaged in a common employment, but must have opportunity to use precautions against each other's negligence. *Grim v. Olympia Light etc. Co.*, *supra*, and cases there cited. In this case the motormen were engaged in the same common employment, that of operating street cars over the same line. They necessarily met each other every hour of the day, because the time from Seattle to Renton consumed but forty-seven minutes. They took their cars from the same barn, and the same rules were furnished to each. There was such coassociation and cooperation in the same line of employment as that each one necessarily knew the habits and capacity of the other and had opportunity of exercising mutual influence upon the other. This made them fellow servants within the rule which

we have heretofore laid down. It is true that one of the allegations of negligence in the complaint was that the master failed to furnish a sufficient block system upon the block where the collision occurred, but the respondent testified that, if the motorman on the southbound car had turned his lights south when he entered upon the block, the accident could not have occurred, because respondent in that event would have seen the lights and remained at Norman street or returned to that point. It was nowhere claimed that the light system was defective in its construction or operation, and the statement that the accident could not have happened if the light had been used indicates that the system was sufficient for the purposes for which it was intended, and was reasonably safe, which is all that is required. *Chicago etc. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921. The respondent knew the system; he had worked under it for about eighteen months, and had made no complaints concerning it. He knew the rules required the motorman to turn on the lights on entering the block. The rules and system were for the protection of the motormen as well as for the protection of passengers. The appliances were reasonably safe, and it was the duty of the motorman to use them for the purpose of preventing collisions and delays. Under the evidence of respondent above stated, assuming that he was correct in his construction of the rules that it was the duty of the motorman on the southbound car to turn his light, it was the duty of the trial court to take the case from the jury upon the motion of the appellant, upon the ground that the act of negligence directly causing the collision was the act of a fellow servant. It may be said, in justice to the trial court, that the case of *Grim v. Olympia Light etc. Co.* had not been decided when this case was tried.

The judgment is reversed, with directions to the lower court to dismiss the action.

CROW, ROOT, and RUDKIN, JJ., concur.

FULLEERTON, HADLEY, and DUNBAR, JJ., dissent.

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[No. 8297. Decided September 25, 1906.]

DRAINAGE DISTRICT NO. 15 OF SKAGIT COUNTY, by J. O.
Rudene et al., Respondents, v. WILLIAM ARMSTRONG
et al., Appellants.¹

DRAINS—ASSESSMENTS FOR BENEFITS—WAIVER OF DAMAGES—CONTRACT—CONSIDERATION—EVIDENCE—ADMISSIBILITY. Evidence is not admissible of want of consideration for a waiver of damages, signed by property owners upon the organization of a drainage district, which waiver recited as a consideration the desirability of forming the district and that the waiver was necessary therefor, where the evidence offered was that the waiver was induced by fraudulent representations of one R., who was interested in the matter and afterwards one of the commissioners of the district, to the effect that the owners would not be taxed if not benefited, and that R. agreed with them that they would not be benefited; since (1) R. did not agree that they should not be taxed if benefited; (2) the representations were not the consideration recited in the waiver, or the sole consideration; and (3) R. had no authority to agree that they should not be taxed for benefits.

SAME—CONSIDERATION. In such case, a waiver of damages reciting that it was of importance to the signers that the district be organized and that other owners refused to join in the petition unless the waiver was signed, states two sufficient considerations for the waiver.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered February 13, 1906, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for the assessment of damages and benefits to lands located within a drainage district. Affirmed.

Million & Houser, for appellants.

McLean & Wakefield, for respondents.

MOUNT, C. J.—This action was brought by the respondents to assess the damages and benefits to lands located within a drainage district organized pursuant to laws relating to drain-

¹Reported in 87 Pac. 52.

age districts. Bal. Code, § 3715 *et seq.* (P. C. § 4530). The appellants have appealed from a judgment levying an assessment of \$10 per acre for benefits accruing to their lands.

At the trial of the case the appellants sought to offset damages alleged to have accrued to them by reason of a dam which cut off navigation from their warehouses. It appears that, when the petition for the formation of the district was being circulated, appellants signed a contract as follows:

“Waiver of Damages. Whereas, it is proposed to organize a large portion of the territory which drains into the Sullivan Slough in the county of Skagit, Washington, into a drainage district, under and by virtue of the laws of the state of Washington, and Whereas, it is intended to dam said slough at some convenient point, not higher up than the bridge, nor lower down than the section line between section 31 in township 34, and section 6 in township 33 in range 3 in said county, and Whereas, the construction of such dam will cut off steamboat navigation of said slough above the said proposed dam, and Whereas, certain individuals have warehouses for the storage of grain located upon said slough, or the arms thereof, and said parties may have cause of action against said proposed drainage district when the same shall have been organized, and Whereas, it is of importance to said individuals that said drainage district be organized, and certain individuals residing within the territory of said proposed drainage district decline to sign the petition of said proposed drainage district or assist in causing the same to be organized, unless a waiver of damages by reason of the construction of said dam be made by the said individuals so interested, now therefore, we, the undersigned hereby waive any or all right or claims to damages by reason of the construction of said dam and cutting off the navigation of said slough, or any of the arms or branches thereof, and will bring no action for such damages, providing all of the following named individuals sign this waiver.”

Appellants offered to prove that, when they signed the above waiver, one Rudene who was interested in establishing the drainage district and who was afterwards elected one of the commissioners of the district, represented to appellants that,

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in case they signed said waiver, no assessments for benefits would be made against their lands, and that upon such representation appellants signed the waiver, and that this was the sole consideration therefor. The court received evidence to the effect that appellants told Rudene that they would not receive any benefits, and that Rudene agreed with them. The gist of the evidence upon this point is stated by Mr. Armstrong, one of the appellants, as follows:

"He [Mr. Rudene] said that we were the only ones that stood in the way and would flood the Beaver marsh and that country all out, so we gave in and did not want to stand in the way of a large vicinity in the Beaver marsh, and that is the reason we gave our granaries, and now they want to tax us. He said that if we were not benefited we would not be taxed, and of course we talked it over that we would not be benefited in there and he agreed with us, and that led us to think we never would be taxed."

The court, upon motion of respondents, struck out all the evidence relating to damages on account of the warehouses. Appellants contend upon this appeal that the court erred in striking this testimony and in holding that the contract above set out is a binding waiver of damages. We think the court properly struck out the evidence for several reasons; first, the evidence does not show that Mr. Rudene agreed that appellants should not be taxed if they were benefited; second, this was not the consideration expressed in the written waiver, and was clearly not the sole consideration, and third, Mr. Rudene at no time had any authority to release any one from the payment of benefits; at least, there is no showing of such authority in the record before us.

Appellants also contend that the contract of waiver is not binding upon the appellants, because the waiver is not based upon a valid consideration. The contract of waiver states the consideration as follows:

"It is of importance to said individuals [meaning these appellants and others] that said drainage district be organized, and certain individuals residing within the territory of

the said proposed drainage district decline to sign the petition of said proposed drainage district or assist in causing the same to be organized, unless a waiver of damages by reason of the construction of said dam be made by the said individuals so interested."

Two considerations were here named, one as an advantage of the appellants and the other to obtain the signatures of necessary parties who refused to sign the petition unless such waiver was made. Either of these considerations was sufficient to make the waiver binding upon the appellants. 9 Cyc. 330; 6 Am. & Eng. Ency. Law (2d ed.), p. 721; 1 Parsons, Contracts (8th ed.), p. 468 *et seq.*; *Staver and Walker v. Missimer*, 6 Wash. 173, 32 Pac. 995, 36 Am. St. 142.

We think there is no merit in either of the questions presented, and the judgment is therefore affirmed.

DUNBAR, HADLEY, FULLERTON, ROOT, and CROW, JJ.,
concur.

[No. 6129. Decided September 25, 1906.]

EUGENE F. LAWSON, *Respondent*, v. BLACK DIAMOND COAL
MINING COMPANY. *Appellant*.¹

JUDGMENT—FAILURE TO ANSWER INTERROGATORIES—CONSTITUTIONAL LAW—DUE PROCESS. Bal. Code, § 6013, authorizing the court to strike a pleading and give judgment against a party for failure to answer interrogatories is not unconstitutional as depriving a party of property without due process, since such failure to answer may be construed as an admission of material facts; hence such judgment is justified only where the failure to make discovery as to material facts is alleged and proved.

SAME. In an action against a corporation to recover a broker's commission, interrogatories respecting negotiations and correspondence had with a stockholder relate to immaterial matters, as the stockholder has no power to bind the corporation; and failure to answer the same does not warrant judgment.

SAME—DISCOVERY—PRODUCTION OF DOCUMENTARY EVIDENCE. After failure of a defendant to specifically answer interrogatories, filed for

¹Reported in 86 Pac. 1120.

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Citations of Counsel.

a discovery of facts and documents material to the support of the action, under Bal. Code, § 6009, the court is not warranted in striking the answer and entering a default judgment for failure to produce and attach to the answer certain correspondence called for by the plaintiff under Bal. Code, § 6047, making provision for the inspection of books and papers in hands of the opposite party material to the issue, and for permission to make copies thereof, upon pain of exclusion of the evidence as punishment for contempt; since it was not the intention of the legislature to furnish a cumulative remedy by these two sections.

DISCOVERY—[INSPECTION OF PAPERS—MATERIALITY. A party upon whom a demand is made for the inspection of papers or documents as provided by Bal. Code, § 6047, has the right to defeat the demand by showing that such documents or papers sought are not material to the support or defense of the action.

JUDGMENT—DEFAULT—ANSWER TO INTERROGATORIES—²MOTION TO MAKE MORE SPECIFIC—TIME FOR FILING. Upon the granting of a motion to strike certain answers to interrogatories, for the reason that they are insufficient in certain particulars, it is error to grant judgment of default without requiring more specific answers and fixing a time for the filing thereof, in order that upon failure to file the same the time of a default may be definitely known.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 4, 1905, in favor of the plaintiff, upon striking defendant's answer upon failure to answer interrogatories, in an action to recover broker's commissions. Reversed.

Garret W. McEnerney, and *Piles, Donworth, Howe & Farrell*, for appellant, contending that the striking of defendant's answer and the entry of judgment as for default, was a deprivation of property without due process, and contravened § 1 of the fourteenth amendment to the Federal constitution, cited: *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. 147; *Younger v. Superior Court*, 136 Cal. 682, 69 Pac. 485; *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 889; *Meacham v. Bear Valley Irr. Co.*, 145 Cal. 606, 79 Pac. 281, 68 L. R. A. 600; *Greig v. Ware*, 25 Colo. 184, 55 Pac. 163. The correspondence was confidential and privileged.

Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 Pac. 202. The interrogatories were immaterial and irrelevant, and should have been stricken. *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202. The corporation being unable to answer on oath, an officer of the corporation should have been made a party. 14 Cyc. 310, 311; 1 Daniel, Chancery Practice, 143-146, 196, 322, *378; *Vaughan v. East Tennessee etc. R. Co.*, 1 Flip. 621, Fed. Cas. No. 16,898; *Virginia etc. Mfg. Co. v. Hale*, 93 Ala. 542, 9 South. 256; *McComb v. Chicago etc. R. Co.*, 7 Fed. 426; *Roanoke St. R. Co. v. Hicks*, 96 Va. 510, 32 S. E. 295. The defendant had no control over the documents or the witness in whose possession they were. *McComb v. Chicago etc. R. Co.*, *supra*; *Hancock v. Franklin Ins. Co.*, 107 Mass. 113; *Central Grain & Stock Exch. v. Board of Trade*, 125 Fed. 463.

Hughes, McMicken, Dovell & Ramsey, for respondent, contended, *inter alia*, that the joinder of an officer of the corporation was not necessary. *Colgate v. Campagnie Francaise*, 23 Fed. 82; *Continental Nat. Bank v. Heilman*, 66 Fed. 184; Bal. Code, § 6010. It was not error to require the defendant corporation to attach, as part of its answer to the interrogatories, copies of correspondence. Bal. Code, §§ 6008, 6009, 6047. The scope of the examination of a party before the trial may be as broad as cross-examination and to the same extent discretionary with the trial judge. *Stuart v. Allen*, 45 Wis. 158; *Kelly v. Chicago etc. R. Co.*, 60 Wis. 480, 19 N. W. 521; *Cleveland v. Burnham*, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190; *Hoyt v. Smith*, 23 Conn. 177, 60 Am. Dec. 632; *Volusia County Bank v. Bigelow*, 45 Fla. 638, 33 South. 704. The granting of a default for failure to answer the interrogatories was not error. *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *Lowry v. Moore*, 16 Wash. 476, 48 Pac. 238, 58 Am. St. 49; Alabama Code 1837, § 1856; *Allen v. Lathrop-Hatton Lumber Co.*, 90 Ala. 490, 8 South. 129; Connecticut General Statutes, § 999, Rules of Practice, 26

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Atl. XII, rule 5; *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn.*551, 29 Atl. 76, 25 L. R. A. 856; Florida Revised Statutes 1892, § 1115; Georgia Code 1895, §3956; Mansfield's Digest of Statutes of Arkansas, § 5101; Sandell and Hill's Statutes of Arkansas, § 5790; Iowa Annotated Code, § 3611; Indian Territory Statutes, § 3306; *Beacham v. Gurney*, 91 Iowa 621, 60 N. W. 187; *Blair v. Sioux City etc. R. Co.*, 109 Iowa 369, 80 N. W. 673; Indiana Annotated Statutes (Burn's), § 521; *Belton v. Smith*, 45 Ind. 291; *Nelson v. Neely*, 63 Ind. 194; Garland's Revised Code of Practice, § 349; *Magee v. Dunbar*, 10 La. 546; *Coar v. Mitchell*, 7 La. 520; *Polo v. Natili*, 14 La. 260; *Seaman, Beck & Co. v. Babington*, 11 La. Ann. 173; Massachusetts Revised Laws 1902, § 66; *Harding v. Noyes*, 125 Mass. 572; *Harding v. Morrill*, 136 Mass. 291; Clark's Code of Procedure 1900, § 584; Missouri Revised Statutes 1889, §§ 8920, 8924; *Snyder v. Raab*, 40 Mo. 166; *Dustin v. Farrelly*, 81 Mo. App. 380; North Dakota Revised Code 1899, § 5660; New York Annotated Code of Civil Procedure, § 808; Bird-eyce's Revised Statutes of New York, p. 976; *Gould v. McCarty*, 1 Kernan 575; Mississippi Annotated Code 1892, § 1761; *Illinois Central R. Co. v. Sanford*, 75 Miss. 862, 23 South. 355; Bates' Annotated Ohio Statutes (2d ed.), 1898, § 5101; Pepper & Lewis' Digest, p. 103, § 4, p. 269, § 36; South Carolina Code 1902, § 395; *Roche v. Chaplin*, 1 Bailey (S. C.) 419; *Toomer v. Righton*, Riley (S. C. Eq.) 263; South Dakota Revised Code, § 483; Milliken and Vertress' Code of Tennessee, § 4657; Texas Revised Statutes, § 2297; Wisconsin Statutes 1898, §§ 4096, 4097; Wyoming Revised Statutes, § 3575; District of Columbia Compiled Statutes, p. 220, § 31; Delaware Revised Laws, vol. 1, p. 799, § 13; Florida Revised Statutes 1892, § 1115; Georgia Code 1882, § 3510; Maryland Code 1882, vol. 2, art. 75, § 94; Ohio Revised Statutes, § 5289; Wyoming Revised Statutes 1887, § 2637; North Carolina Code, § 373; Sandell & Hill's Arkansas Digest 1894, § 2899; Missouri Revised Statutes 1899,

§ 2180; Virginia Code 1887, § 337; West Virginia Code 1887, chapter 120, § 43; United States Revised Statutes, § 724; *Iasigi v. Brown*, 1 Curt. 401; *Merchants' Nat Bank v. State Nat. Bank*, 3 Cliff. 201; *Victor G. Blode Co. v. Bancroft & Sons Co.*, 110 Fed. 76; Victoria Statutes, act. 14 and 15, chapter 99, § 6.

RUDKIN, J.—The complaint in this action alleges that the plaintiff and his assignors rendered and performed services, at the special instance and request of the defendant, in securing a purchaser for certain coal mines and other properties owned by the defendant in King county; that by and through such services, the Pacific Coast Company, a corporation, was induced to purchase said property for the sum of \$1,100,000; that the defendant received and accepted the benefit of the services so performed by the plaintiff and his assignors, and sold and delivered said properties to the Pacific Coast Company, receiving the sum of \$1,100,000 in payment therefor, and that the reasonable and agreed value of the services so performed is five per cent of the sum for which said properties sold, or \$55,000, no part of which has been paid. The answer admits the sale of the properties to the Pacific Coast Company, and the price for which the same were sold, but in substance denies the remaining allegations of the complaint.

The action was commenced and the complaint filed on July 13, 1904. The answer was filed on the 16th day of November, 1904. On November 22, 1904, the plaintiff propounded interrogatories to the defendant to the number of eighteen, for the discovery of facts and documents material to the support of the action. On December 12, 1904, a motion was interposed by the defendant to strike each and all of these interrogatories. This motion was denied on January 18, 1905, and the defendant was allowed ten days to further answer. March 20, 1905, answers to the interrogatories were filed, and on March 25, 1905, the plaintiff

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moved the court to strike certain of the answers and to require the defendant to answer the interrogatories more specifically in certain particulars specified in the motion. This motion was argued and submitted on the 23d day of April, 1905, and on the 18th day of May, 1905, the court announced its ruling, in the absence of the parties, granting the motion, but no time was fixed within which further answers should be made. October 17, 1905, the plaintiff filed a motion to strike the answer of the defendant and for judgment according to the prayer of the complaint, for failure to answer the interrogatories propounded to it. A hearing was had on this motion October 21, 1905, and the motion was granted, the answer stricken, and the default of the defendant declared and entered. On the 3d day of November, 1905, judgment was entered against the defendant according to the prayer of the complaint, without the taking of proof. From this judgment the defendant appeals.

The interrogatories in question were propounded under Bal. Code, § 6009 (P. C. § 969), which provides as follows:

"Instead of the examination being had at the trial, as provided by the last section, the plaintiff, at the time of filing his complaint or afterwards, and the defendant, at the time of filing his answer or afterwards, may file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party."

The answer was stricken and judgment taken by default under Bal. Code, § 6013 (P. C. § 973), which provides as follows:

"If a party refuse to attend and testify at the trial, or to give his deposition, or to answer any interrogatories filed, his complaint, answer or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt: *Provided*, That the preceding sections shall not be construed so as to compel any person to answer any question when such answer may tend to criminate himself."

The appellant earnestly insists that § 6013, *supra*, deprives it of its property without due process of law, in violation of § 1 of the Fourteenth Article of Amendments to the constitution of the United States. If the statute be construed as authorizing the striking of the answer and the taking of judgment by default, for failure to answer interrogatories, solely as a punishment for contempt, and without any regard to the substance of the interrogatories or the nature of the discovery sought, this objection would seem to be well taken. *McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80; *Winsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. If, on the other hand, the refusal of a party to attend and testify at the trial, or to give his deposition, be treated as an implied admission of the facts at issue on his part, the same as a failure to deny the allegations of a pleading, we think the statute is free from constitutional objection. From a party's refusal to testify it may well be presumed that, if his testimony were given, it would sustain the cause of action or defense of his adversary, and we think that this is a presumption the law and the courts have a right to indulge. On the same principle, the refusal of a party to answer interrogatories may be treated as an implied admission of the facts in relation to which a discovery is sought. But, if there are numerous issues in a case, and a discovery is sought only as to one of these issues, the striking of the answer and the taking of judgment on all the issues, for failure to make discovery as to one, can only be justified on the theory that the judgment is given as a punishment for the failure to make discovery, and it may well be doubted whether such a proceeding can be sustained under the authorities above cited.

Assuming that the statute is valid, however, even if construed contrary to the above views, we are still satisfied that a party invoking its penalty must show that his adversary has failed to make discovery of facts *material to the support*

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of the action or defense. To illustrate: The fourth, fifth and sixth interrogatories propounded in this case make inquiry as to the number of shares of stock in the appellant corporation, the name, residence and number of shares owned by each stockholder, and the transfers made between the time the alleged contract was entered into between the plaintiff and his assignors and the appellant corporation, and the time of the sale to the Pacific Coast Company. Ordinarily, in a personal action against a corporation for the recovery of a money judgment, such inquiries are wholly irrelevant, and it would surely not be contended that a failure to make a discovery as to such facts would warrant the striking of the answer and the entry of a judgment by default, unless something further were shown. In the light of this rule, let us examine the interrogatories, the answers to which are claimed to be insufficient and to warrant the ruling of the court below.

The 8th, 9th, 10th, 11th, 13th, 14th No. 1, 14th No. 2, and 15th interrogatories inquire as to negotiations between D. O. Mills, or any one on his behalf, or on behalf of the appellant corporation, with James J. Hill, or any one on his behalf, or any officer, stockholder, or person interested in or representing the Pacific Coast Company, looking to a sale of the properties in question to the Pacific Coast Company; as to any offers made by D. O. Mills, or any person on his behalf, or any person having an interest in the appellant corporation, to sell said properties to the Pacific Coast Company; as to any offers made by James J. Hill, or any one on his behalf, or any officer or stockholder of the Pacific Coast Company, looking to a purchase of said properties; whether any officer or employee of the Great Northern Railway Company ever made any offer to D. O. Mills, or any one on his behalf, or any officer or stockholder or person interested in the appellant corporation, looking to a purchase of said properties; and required the appellant to set forth fully all such offers and negotiations. The 12th interrogatory re-

quired the appellant to attach to its answers copies of any correspondence between D. O. Mills and the appellant corporation, or any of its officers, relating to the sale or purchase of said properties. The 17th interrogatory required the appellant to attach copies of all correspondence between D. O. Mills and H. H. Taylor, president of the appellant corporation, relating to the sale or purchase of said properties. These interrogatories were answered by the president of the appellant corporation, and such answers were adopted by the corporation itself. The substance of the answers to the 8th, 9th, 10th, 11th, 13th, 14th No. 1, 14th No. 2, and 15th interrogatories was, that the deponent was informed and believed that D. O. Mills did have negotiations with James J. Hill, looking to the sale of all said properties, and that the deponent had in his possession, as the personal agent of D. O. Mills, certain correspondence between D. O. Mills and James J. Hill, in reference to said sale, but that such correspondence was not in the custody of the appellant corporation, or in the custody of the deponent, as an officer of said corporation, or of any other officer of said corporation as such officer; and that the deponent had no knowledge of any other negotiations of said D. O. Mills in reference to such matters, except from hearsay and information derived from said D. O. Mills; that the deponent had no knowledge of any offer of said D. O. Mills to sell said properties, except from hearsay and the personal correspondence of said Mills above referred to, and that deponent had no knowledge of any offers made by the said Hill to purchase said properties except such as was derived from hearsay. The answers then set forth in detail the negotiations for the sale of said properties conducted by persons other than said Mills. The answer to the 12th interrogatory was that there was no correspondence between D. O. Mills and the appellant corporation, or between Mills and the deponent, as an officer of said corporation, in relation to such sale; that the deponent had

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no knowledge of any correspondence between Mills and any other officer of appellant corporation, and if any such correspondence passed the same was not in the custody or possession of the appellant corporation, or the deponent. No answer was made to the 17th interrogatory, calling for copies of the correspondence between D. O. Mills and H. H. Taylor, relating to the sale or purchase of said properties.

The principal objection urged against these answers is their failure to set forth the details of the negotiations between D. O. Mills and other parties relating to the sale or purchase of the properties in question, and the failure of the appellant to attach to its answers the correspondence called for. D. O. Mills is a resident of the city of New York. His only connection with the appellant corporation, so far as disclosed by the record before us, is this: He owns 15,751 of the 50,000 shares of the capital stock of the appellant, and holds an additional five hundred shares as trustee; and H. H. Taylor, the president of the appellant corporation, is the personal agent of D. O. Mills, located at San Francisco, California. It will scarcely be contended that these facts of themselves make the negotiations or correspondence of D. O. Mills competent evidence against the appellant, and we do not understand that the respondent so contends. The functions of stockholders of a corporation are exceedingly limited. They have no power as such to negotiate, contract, or correspond for the corporation of which they are stockholders, and such negotiations, contracts or correspondence do not bind the corporation, unless previously authorized or subsequently ratified by it. Cook, Stockholders (2d ed.), §§ 708-711. Nor did the fact that the president of the corporation was the personal agent of the stockholder transform the stockholder into an agent of the corporation or its president.

But the respondent contends that he could show, by other testimony, not only that D. O. Mills was a large stockholder,

but that, through other stockholders, he absolutely controlled the policy of the appellant corporation, named its board of directors and put in charge of its affairs his personal agent Taylor, and that Taylor, and therefore Mills, had power to make all negotiations for the sale of the properties. Such a showing, if made, would doubtless show the materiality of the facts sought to be elicited by the interrogatories. On the trial of an action courts often admit evidence out of order, the relevancy of which does not appear, on the promise of counsel to connect it and show its materiality during the progress of the trial, and this same practice doubtless prevails in the settlement of interrogatories to be attached to commissions to take depositions and, on motion, to strike interrogatories, such as was interposed in this case. But when a party invokes the harsh remedy of striking a pleading and taking a judgment by default, he must not only allege, but must prove, the facts showing the materiality of the facts of which a discovery is sought, where such materiality does not appear from the interrogatories themselves, and no such showing was made in this case. In other words, he must prove that his adversary has failed or refused to make discovery of material facts.

The appellant further contends that the court was not warranted in striking the answer and giving judgment by default for failure to produce the correspondence called for. Bal. Code, § 6047 (P. C. § 1011), provides as follows:

“Any court, or judge thereof, in which an action is pending may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession, or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it such as he alleges it to be, and the court

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may also punish the party refusing as for contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents where he is examined as a witness."

This and § 6009, *supra*, are parts of the original practice act of 1854. We do not think that it was the intention of the legislature to furnish a cumulative remedy by these two sections found in the same act. The purpose of § 6009 was evidently to enable a party to discover the existence and whereabouts of documents in order that he might subpoena the person having their custody, and have the same produced at the trial, or obtain an inspection and copy under § 6047. Counsel for respondent say that this is not the proper construction of the statute, because § 6047 expressly provides that it shall not be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness. The answer to this contention is that the party to whom interrogatories are propounded is not examined as a witness at the trial. When a party is examined as a witness, he has a right to show by cross-examination that the documents sought are not material, and he has the same opportunity when an inspection is demanded under § 6047. And where an attempt is made to inquire into the private papers of a party, especially when not a party to the action, a showing of materiality should always be required. These views are in accord with the doubt expressed in *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202. The court there said:

"It may well be doubted whether, under § 6009, *supra*, the production of any documentary evidence could be demanded, in view of the provisions of § 6047, Bal. Code, which makes ample provision for the inspection of books and papers in the hands of the opposite party material to the issue, and for permission to make copies thereof."

We think the construction we have adopted is consistent with the statute and consistent with the constitution, and gives to

the party propounding interrogatories or demanding documents the full benefit of any advantage he might derive from the answers if made or the documents if produced. When the court struck the answer to the interrogatories and required more specific answers, it should have fixed a time within which further answers should be filed, in order that the time of the appellant's default might be definitely known, unless the time is fixed by some rule of court of which we are not advised.

The judgment is reversed, and the appellant will be allowed ten days in which to further answer the interrogatories after the remittitur is filed in the court below, and all further proceedings in the case will be in accordance with this opinion.

MOUNT, C. J., HADLEY, and CROW, JJ., concur.

[No. 6170. Decided September 25, 1906.]

LEWIS E. CAPPS *et al.*, Respondents, v. A. V. FREDERICK *et al.*,
*Appellants.*¹

SPECIFIC PERFORMANCE—TO COMPEL SUBLEASE—LEASE TAKEN IN NAME OF THIRD PERSON—REAL PARTIES IN INTEREST. An agreement, as part consideration for the sale of a stock of goods, that the defendants would obtain an extension of their lease of a storeroom then in their possession, and that they would sublease one-half of the room to the plaintiffs for the term of the renewal, will be enforced, and it is not ground for denying specific performance that the court had no jurisdiction over the defendant's son, a nonresident, in whose name the renewal was taken, and who, at their request, held the lease in his name as their agent; it appearing from the evidence that the son had no interest in the lease or leased property, that the defendants retained and occupied the premises and paid the rent, and were the only real parties in interest.

APPEAL — REVIEW — INTERROGATORIES — FAILURE TO ANSWER — DEFAULT Section 6013, Bal. Code, authorizes courts to grant default judgments upon the failure of a party to answer interrogatories filed, where the interrogatories go to all the issues in the case, and

¹Reported in 86 Pac 1128

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where the refusal to answer may be taken as an admission of the facts at issue, and is not invalid and unconstitutional; and the entry of a judgment thereunder will not be disturbed on appeal when the interrogatories are not brought up, but the presumption will arise that the interrogatories extend to all the issues and that the refusal to answer is an admission of the facts sought to be determined.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 1, 1905, in favor of the plaintiffs, upon default of the defendants for failure to answer interrogatories, in an action for specific performance. Affirmed.

Fred H. Peterson and H. C. Force, for appellants.

Shank & Smith, for respondents.

MOUNT, C. J.—This action was brought to enforce specific performance of an agreement to lease, and for damages. The trial court entered judgment as prayed for in the complaint, and the defendants appeal.

The facts are as follows: The defendants A. V. Frederick and M. M. Frederick, his wife, were in possession of a certain storeroom in the city of Seattle, under a lease from one T. D. Hinckley, for a period of five years from September 15, 1899. On May 9, 1903, the defendants A. V. and M. M. Frederick sold a portion of their stock of goods to the plaintiffs, and in consideration thereof, and the payment of \$175 per month rental, entered into a written agreement with plaintiffs to the effect that they would obtain an extension of their lease from Mr. Hinckley in 1904 for the term of five years thereafter, and would sublease the south half of the storeroom to the plaintiffs for the term of the renewal lease. Plaintiffs thereupon went into possession of the storeroom. On June 28, 1904, a renewal lease was executed by Mr. Hinckley for the term of a little more than five years. At the request of said A. V. Frederick and his wife, the lease was made in the name of their son H. A. Frederick, who was then and now is residing in California. This lease, however,

provided that M. M. Frederick should be the agent of her son H. A. Frederick for all purposes of the lease, and that any notice or service upon her should be deemed personal service upon said H. A. Frederick. A. V. Frederick and his wife guaranteed performance of all the conditions of the lease and payment of the rent by written indorsement on the back of the lease. Thereafter, A. V. and M. M. Frederick actually occupied the premises, or that portion thereof not occupied by the plaintiffs.

After the execution of this last-named lease by Hinckley to the defendants, they refused to execute a lease to plaintiffs as they had agreed to do, and retook possession of a portion of the storeroom included in the space which was to be let to the plaintiffs. Plaintiffs were compelled to store a part of their goods in another place. Plaintiffs thereupon brought this action. In addition to the facts above stated, the plaintiffs in their complaint alleged substantially that the defendant H. A. Frederick had no interest whatever in the said lease or the storeroom, had never been in possession thereof, but that the other defendants were the real parties in interest, and that if the sublease agreed upon were not made to plaintiffs, their business would be destroyed and that their damage could not be adequately measured or compensated in money. The complaint was served personally upon the defendants A. V. and M. M. Frederick in this state, and upon H. A. Frederick, personally, in California. The latter appeared specially and objected to the jurisdiction of the court. His objections were overruled and he answered separately, still appearing specially. The other defendants filed a general demurrer, which was overruled. They then answered. The answers were general denials of the allegations of the complaint. Thereupon the plaintiffs propounded interrogatories to be answered by each of the defendants. The defendants refused to answer these interrogatories, and upon motion of the plaintiffs, a default was entered against them

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for failure to do so. The case was subsequently set down for trial, and the defendants appeared by their counsel and cross-examined plaintiffs' witnesses at the trial, but offered no evidence in their own behalf. The court thereupon made findings and entered a decree in favor of the plaintiffs against the defendants A. V. Frederick and M. M. Frederick, and appointed a commissioner to execute the lease to plaintiffs.

Appellants argue, first, that the court had no jurisdiction over the person of the defendant H. A. Frederick, and therefore no power to order the execution of the sublease to plaintiffs. We may concede for this case that there was no jurisdiction over the person of H. A. Frederick, and still the judgment must be affirmed as against the other two appellants because the facts alleged and proven clearly show that H. A. Frederick has no interest whatever in the lease or in the leased property. He was the son of the other two appellants, he was and is now residing in the state of California; the other two appellants obtained the lease of the premises for their own use and benefit, and occupied a portion of the premises and paid the rent prior to the last lease, the whole lease was renewed to them, but at their request was taken in the name of their son. He can be considered, therefore, no more than an agent for his father and mother, who are the real principals. The lease was taken in his name, no doubt, for the purpose of attempting to place it without their power to perform their contract with the plaintiffs. They still retained and occupied the premises, and paid the rent. The lease upon its face shows that they were bound for the rent, and the lessor testified that he leased the property to them but made the written lease in the name of their son at their request and in consideration that they should occupy the premises and pay the rent. Under these circumstances, it is plain that they are the only real parties in interest, and a court of equity would hesitate to say that the contract of A. V. and M. M. Frederick would not be enforced because

they were not the record holders of the lease. They are the actual lessees in possession, and are bound as fully as if the lease had been taken in their own names. It is therefore unnecessary to further consider questions presented, upon the theory that H. A. Frederick was the real lessee from Mr. Hinckley.

Appellants contend that the court erred in granting a default against them for failure to answer interrogatories, for the reason that the statute, Bal. Code, § 6013 (P. C. § 973), which provides such procedure, is unconstitutional and void. In *Lawson v. Black Diamond Coal Min. Co.*, ante p. 26, 86 Pac. 1120, we held the statute valid, and that it authorized the court to grant a default where the interrogatories go to all the issues in the case, and where the refusal of the parties to answer them may be treated as an admission of the facts of the case. The interrogatories are not brought here in this case. Appellants rely solely upon the invalidity of the statute. We must presume therefore that the interrogatories went to all the issues, and that the refusal to answer was an admission of all the facts inquired about. In this view it is unnecessary to discuss the evidence which the appellants now claim is insufficient. No personal judgment was taken against H. A. Frederick.

The judgment entered appears to be right, and is therefore affirmed.

DUNBAR, HADLEY, CROW, ROOT, and FULLERTON, JJ., concur.

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[No. 6161. Decided September 25, 1906.]

**JENNIE SCHELL *et al.*, Appellants, v. THE CITY OF
WALLA WALLA, Respondent.¹**

PLEADING—ANSWER—DEMURRER. The overruling of a demurrer to an answer is not error when the demurrer is practically a denial of all the averments of the complaint.

APPEAL—RECORD—INDEX AND CLASSIFICATION. The evidence in a case tried largely on exhibits, immense in quantity, and disorderly arranged in the record, without index or classification of any kind, will not be reviewed.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered September 1, 1905, in favor of the defendant, upon granting a nonsuit at the close of plaintiffs' case, dismissing an action to set aside an assessment for street improvements. Affirmed.

Brooks & Bartlett, for appellants.

Sharpstein & Sharpstein, for respondent.

DUNBAR, J.—This was an action to set aside a street assessment in the city of Walla Walla. The defendant answered, and plaintiffs demurred to the answer, which demurrer was overruled by the court. Upon the conclusion of the testimony, the court stated that the plaintiffs were not entitled to recover anything and had not made out a case entitling them to any judgment whatever, and judgment was entered in favor of the defendant for costs. From such judgment this appeal is taken.

The demurrer to the answer was properly overruled, for it was practically a denial of all the averments of the complaint, and if it did not state a defense, it was because the complaint did not state a cause of action.

On the merits: This case was tried largely upon testimony in the shape of exhibits. These exhibits, which are

¹Reported in 86 Pac. 1114.

immense in quantity, consisting of large newspaper clippings, reports, certificates, summons, orders, etc., are bundled into the record in the wildest confusion, without index or classification of any kind. It is even doubtful if the certificate of the judge could be deemed to comprehend them. The duty is not imposed upon this court to employ its time in segregating and classifying such testimony in a manner that would make it practical for consideration, and certainly without such consideration the judgment could not be reversed. The appellants, in answer to the suggestion of the respondent that the judgment should be affirmed on account of the impossibility of arriving at a just determination by reason of the state of the record, do not deny the confused condition of the record, but attempt to excuse it by asserting that the confusion was brought about by the suggestions of the counsel for the respondent as to how the cause should be tried in the lower court. We hardly see what effect this would have upon the appellants in the preparation of the record on appeal. But, however that may be, the essential fact remains that the exhibits are not presented here in such a manner that they can be examined by the court. In addition to this, from an examination of the oral testimony presented, we are satisfied that the court was right in the statement made that there seemed to be no merit in the case. The allegations of the complaint were not sustained, even by the appellants' own testimony, and the technical legal questions involved have been decided so often by this court that it does not feel called upon to again review them.

The judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, ROOT, and CROW, JJ., concur.

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[No. 6265. Decided September 25, 1906.]

SPOKANE TERMINAL COMPANY, *Respondent*, v. L. P.
STANFORD *et al.*, *Respondents*, and WASHINGTON
SAFE DEPOSIT & TRUST COMPANY, *Appellant*.¹

TAXATION—TAX DEED—VALIDITY IN ABSENCE OF SEAL OF COUNTY TREASURER—EVIDENCE—ADMISSIBILITY. The failure of the legislature to provide an official seal for county treasurers does not invalidate a tax deed executed to a purchaser under the provisions of § 103 of the Revenue Act of 1897 as amended by § 18 of the act of 1899, providing that on the sale of lands for taxes the county treasurer shall execute to the purchaser a tax deed, and such deed made by him, under the official seal of his office, shall be recorded in the same manner as other conveyances; since the requirement of a seal should be construed as surplusage and not mandatory, nor is such a deed inadmissible as *prima facie* evidence in any controversy or suit in relation to the right of the purchaser, his heirs or assigns, to the real estate conveyed, as provided by Laws 1897, p. 190, § 14.

SAME—CURATIVE ACTS. The legislature has power, after the execution by a county treasurer of a tax deed, to cure any defect by reason of the fact that at the date of its execution there was no statute providing for the official seal of the treasurer required by the law to be used in executing the deed.

TAXATION—STATUTORY PROVISIONS—CONSTRUCTION. The old rule of strict construction of statutes relating to the assessment and collection of taxes is modified, and they should receive a fair construction to effect their purpose.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 6, 1906, after a trial on the merits, adjudging title, as between contesting defendants, to lands appropriated in condemnation proceedings. Affirmed.

Cullen & Dudley, for appellant.

Munter & Jesseph, for respondents.

DUNBAR, J.—This action was instituted by a petition filed by the Spokane Terminal Company for the condemnation of lots 30 and 31, in Second Addition to Third Addition to Rail-

¹Reported in 87 Pac. 37.

road Addition to Spokane Falls. In the petition it was alleged that the defendants L. P. Stanford and wife were the owners of the lots, and that the defendant the Washington Safe Deposit & Trust Company claimed some lien thereon or interest therein. The Washington Safe Deposit & Trust Company appeared and filed an answer, denying the ownership of the lots by the Stanfords, alleging title in itself, and that the Stanfords occupied the lots as tenants of itself and its predecessors in interest. The Stanfords replied, denying the allegations of ownership in the appellant, and tenancy, and alleged affirmatively title in themselves under a tax deed issued by the treasurer of Spokane county, March 17, 1902. The condemnation proceedings were tried out, and an award of \$1,200 made by the jury, and judgment entered appropriating the lots to the terminal company upon payment of the award.

The issues raised by the appellant's answer and the reply of the Stanfords were not tried at that time, and the judgment entered in the condemnation proceedings provided, among other things, that it appearing that there was a contest between the defendants concerning the title to said premises and to the right to the money awarded, the amount of the judgment when paid should be retained in the registry of the court until the determination of the rights of the respective defendants. The award was paid into the court. The issues between the respondents Stanford and wife and the appellant came on for hearing, and upon such hearing, judgment was entered holding that the title to the lots at the time of the condemnation was in the Stanfords and that the appellant had no interest therein, and ordering that the money deposited in the court by the terminal company be paid to the Stanfords. From this judgment the appeal is taken. So that the issues relate solely to the title to the lots condemned. The case was tried without a jury, and no findings of fact or conclusions of law were made or filed.

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The assignments are, (1) that the court erred in failing to find the respondents L. P. Stanford and wife were tenants of the appellant's predecessor in interest; (2) the court erred in refusing to hold that the respondents L. P. Stanford and wife were precluded by their relation as tenants from acquiring a tax title to the lots in controversy; (3) the court erred in admitting in evidence over the appellant's objection the treasurer's deed; (4) the court erred in refusing to hold the tax deed void; (5) the court erred in holding that it appeared that the respondents were the owners of the lots condemned and entitled to the award paid in the condemnation proceedings.

It is contended by the appellant that a tenant cannot acquire the demised property as against the landlord at a tax sale, and that a tenant who has entered or held possession of the premises under the landlord cannot, at least without surrendering possession, be heard to dispute the landlord's title; and many cases are cited to sustain this contention. This question, in our judgment, might be disposed of by the statement that a perusal of the record satisfies us that the court was warranted in refusing to find that the respondents were tenants of Stocker, the appellant's grantor, though we do not wish to impliedly hold that the rule that a tenant shall not be allowed to dispute the title of his landlord reaches beyond the particular title under which he enters into possession, or that he may not receive a tax title where he is under no obligation to pay the taxes on the land which become delinquent.

The deed from the county to the respondent L. P. Stanford was offered in evidence over appellant's objection, and the ruling of the court on this is alleged as error. The deed, which is in evidence as plaintiff's exhibit A, is dated March 27, 1902, and contains the following recital by the maker: "Given under my hand and seal of office this 17th day of March, A. D. 1902." There is thereon the impression of a

seal purporting to be the official seal of the county treasurer. Section 103 of the revenue act of 1897, as amended by § 18 of the act of 1899, provided for the sale of lands by the treasurer for the enforcement of the lien of delinquent taxes, and provided for the issuance of a deed as follows:

"The county treasurer shall execute to the purchaser of any piece or parcel of land a tax deed. The deed so made by the county treasurer, under the official seal of his office, shall be recorded in the same manner as other conveyances of real estate, and shall vest in the grantee his heirs and assigns, the title to the property. . . ." Laws 1899, p. 301, § 18.

And § 114 provided as follows:

"Deeds executed by the county treasurer as aforesaid shall be *prima facie* evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns, to the real estate thereby conveyed, of the following facts: . . ." Laws 1897, p. 190.

The contention of the appellant is that, the law not having prescribed any official seal for the county treasurer, no official seal could therefore be attached by the county treasurer; that the deed, not having complied with the mandatory requirements of the law, is therefore void; that it not being such a deed as is required by the statute, it was not *prima facie* evidence, and that its admission in evidence was error. This construction of the law is suggested largely by the Nebraska cases, initiated in *Sutton v. Stone*, 4 Neb. 319, cited by appellant, and which rule was followed in many subsequent Nebraska cases. But the rule laid down in the Nebraska cases we think stands substantially alone in the adjudications in the United States. The United States cases cited to sustain this doctrine simply, as is their uniform custom, sustained the construction placed upon the state statutes by state courts. In the case at bar the legislature, after making a provision that the deed should be made under the official seal of the treasurer's office, failed to provide any official seal; so that there is no violation of the law by the treasurer or omission of any of the

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mandatory provisions of the statute—mandatory in the sense of being harmonious and capable of being performed. Either it was the intention of the legislature that the treasurer should establish or make an official seal and use it (and if that was the intention, then the law was complied with in this case), or there was an inadvertence and omission on the part of the legislature in not providing the seal which it had in mind. For we will not impute to the legislature the intention to provide for the issuance of so important an instrument as a tax deed with the deliberate intention of so framing the law that the deed could not be executed at all. We think that “under the official seal of his office” must be construed as surplusage, not having any relation to or connection with any other provision made in the act, and that it is not a mandatory requirement. The mandatory requirement is that the county treasurer shall execute to the purchaser a tax deed, and that such deed shall be recorded as other conveyances of real estate.

The Mississippi case cited by appellant—*Day v. Day*, 59 Miss. 318—does not sustain its contention. There the statute provided that the auditor should affix his official seal, and that he had an official seal which he could affix is shown by the language of the court, viz: “the auditor has an official seal and it should have been affixed to the conveyance.” Even in Nebraska the doctrine contended for by appellant has been repudiated in later cases. In *Orcutt v. Polsley*, 59 Neb. 575, 81 N. W. 616, the court, in passing on this same contention, said:

“It is true that section 491c of the code of civil procedure does require the county clerk, the clerk of the district court, the county treasurer, . . . to certify, under their hands and official seals . . . It will be noted that some of the officers named in the statute are required by law to have an official seal, while others are not so required. It would seem to be a very reasonable interpretation of the statute

to construe it, which we do, as being the intention of the legislature that such officers mentioned therein as the law required to have an official seal should certify under their hands only, as was done by the treasurer in this instance. It is not presumed that the legislature intended that an officer should do what it is impossible for him to perform."

This construction of the statute in question was approved and followed in *Young v. Wood*, 63 Neb. 291, 88 N. W. 528.

But even if it should be conceded that the deed was not a legal deed as executed, the legislature by act approved February 21, 1903, enacted that the county treasurer should have an official seal, and provided as follows:

"Sec. 2. In all cases in which the county treasurer of any county in the state of Washington shall have executed a tax deed or deeds prior to the taking effect of this act, either to his county or to any private person or persons or corporation whomsoever, said deed or deeds shall not be deemed invalid by reason of the county treasurer who executed the same not having affixed a seal of office to the same or having affixed a seal not an official seal; nor shall said deed or deeds be deemed invalid by reason of the fact that at the date of the execution of said deed or deeds there was in the state of Washington no statute providing for an official seal for the office of county treasurer." Laws 1903, p. 13.

It is contended by the appellant that this statute was void because it had a retroactive effect and undertook to revivify a dead and void law. It is conceded by all authority that, within the constitutional power of the legislature and under proper limitations, it may pass acts curing or validating irregularities, and that this may be done in tax proceedings. So that the test is, whether or not the defect is jurisdictional, for if not jurisdictional but a mere omission or irregularity, the legislature has a right by retrospective statutes to cure it. This is a mere defect or omission, for the legislature might have dispensed with a seal altogether, just as it had been doing for years before, and the statute would have been just as effective without the interjection of the words which

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are complained of, as with them. Mr. Cooley, in his work on Taxation, vol. 1 (3d ed.), at page 480, quotes approvingly from *State ex rel. Steel v. Phillips*, 137 Mo. 259, 38 S. W. 931, where it is said:

"Many statutory regulations are designed for the information of tax officials, and a compliance is not a condition precedent to the validity of the tax,"

and the author in this connection says:

"All legislation must be supposed to take into account the possible, if not probable, mistakes and irregularities of officers in executing the provisions of the law, and it is hardly reasonable to infer an intent, on the part of a legislative body, that a failure of administrative officers to comply with any provision made for the benefit of the state exclusively, or merely as a guide in orderly proceedings, should deprive the state of all benefit to be deprived from a compliance with other provisions that embody the main purpose and object of the law."

In this case the provisions which embody the main purpose and object of the law were complied with. In speaking of curative legislation, it is said by Black on Tax Titles, § 483:

"The objection most frequently urged against this species of legislation is, that it impairs vested rights. But no party can be said to have a vested right in a defense based upon defects or irregularities not affecting his substantial equities. Curative statutes indeed may disturb vested rights, and if so they are void. But with the limitations we are here taking for granted, the objection is not tenable. A learned judge has said: 'All acts curing irregularities in legal proceedings necessarily divest vested rights of the parties, by closing the mouths of those who could otherwise avail themselves of such irregularities to escape from the fulfillment of what is a moral obligation, and, but for the irregularity, would be a legal liability. So whenever formal defects in the execution or acknowledgment of deeds, mortgages, or other conveyances are remedied by legislation, those who might have pleaded and relied on such defects are debarred of that which otherwise would have been a legal vested right. To deny the validity of such laws would be to run the plow-share through

hundreds of titles which are founded and repose in security upon them.' ”

Again it is said:

“When the legislature, by a valid exercise of its authority, has conferred a power to act, and prescribed the mode of action, a substantial compliance with the mode will be essential to a valid exercise of the power, but if the power be irregularly or defectively exercised, and for that reason invalid, the legislature may, by subsequent action, cure any such defect or irregularity, the requirement of which was originally within its discretion. . . . ”

In this case the power, by reason of the incongruity in the legislative enactment, was defectively exercised, and the requirement was originally within the discretion of the legislature. So that, in the absence of any constitutional inhibition, it would seem certain that the legislature had a right under authority generally to remedy the defect. The old rule of strict construction in relation to tax proceedings has been very much modified of late years, and necessarily so to permit the government to carry on its legitimate functions by the enforcement of its tax laws. It was said by the supreme court of the United States in the case of *Turpin v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70:

“Laws for the collection and assessment of general taxes stand upon a somewhat different footing and are construed with the utmost liberality.”

And this court, in passing upon this question in *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759, said:

“But it is evident that, if the statute is to receive such a literal construction, it would serve little or no purpose. While there is some conflict in the authorities as to whether revenue statutes should be given a liberal or strict construction, it seems to us that the better rule is that they should receive a fair construction to effect the end for which they were intended.”

And we see no reason now for departing from the rule thus stated.

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Syllabus.

A fair construction should be given to any law whether it be a law in relation to the collection of taxes or not. We think no error was committed by the court in admitting the deed in evidence, and we may state here that, in passing upon this question, we have examined not only the briefs filed in this particular case, but briefs in other cases which are pending in this court on the construction of this statute in question. There are other errors alleged, in relation to the unintelligible character of the delinquent tax certificates, their premature issue, and questions of notice, but we think they are all without substantial merit, and that all such questions have been practically decided by this court in *Luff v. Gowan*, 38 Wash. 504, 80 Pac. 766; *Taylor v. Huntington*, 34 Wash. 455, 75 Pac. 1104; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022, and many other cases.

There being no reversible error committed by the court, the judgment will be affirmed.

MOUNT, C. J., HADLEY, FULLERTON, ROOT, and CROW, JJ., concur.

[No. 6102. Decided September 25, 1906.]

ANNA SULLIVAN *et al.*, *Appellants*, v. THE SEATTLE ELECTRIC COMPANY, *Respondent*.¹

TRIAL—INSTRUCTIONS—ASSUMPTION OF ISSUE—ARGUMENTATIVE AND COMPLICATED. It is not error to refuse requested instructions of extreme length assuming in some places the issue in controversy, as proved, in other respects argumentative, and as a whole complicated and involved.

CARRIERS—NEGLIGENCE—DUTY TO INTOXICATED PERSON—INSTRUCTION. In an action to recover damages from a street car company for the death of a passenger resulting from alleged negligence in permitting the deceased, while intoxicated, to alight at an unsafe place, it is error to instruct the jury to the effect that the carrier owed no

¹Reported in 86 Pac. 786.

greater care to an intoxicated person than to one in a normal condition, if he knew where he wanted to get off and was able to do so without assistance, and unless he was "absolutely helpless"; since the rule is that the carrier owes to a passenger a duty commensurate with his condition, and it was for the jury to determine whether due care was exercised under all the circumstances.

APPEAL—REVIEW—PARTY ENTITLED TO ALLEGE ERROR. The question of the insufficiency of the plaintiff's evidence, cannot be reviewed at the instance of the defendant, on an appeal by the plaintiffs, in whose favor ruling thereon was made below.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 7, 1906, upon the verdict of a jury rendered in favor of the defendant, in an action against a street railway company for the death of a passenger permitted to alight from a car at a dangerous place while in an intoxicated condition. Reversed.

John E. Humphries and *George B. Cole*, for appellants, to the point that a carrier must exercise toward an intoxicated person a degree of care commensurate with his condition, cited: *Atchison etc. R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877; *Fogg's Adm'r. v. Louisville etc. R. Co.*, 23 Ky. Law 383, 63 S. W. 580; *Haug v. Great Northern R. Co.*, 8 N. D. 23, 77 N. W. 97, 73 Am. St. 727, 42 L. R. A. 664; *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607, 50 Atl. 103, 54 L. R. A. 955; *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842; *Price v. St. Louis etc. R. Co.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57, 5 South. 259, 6 South. 526; *Atchison etc. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105; *Seaboard etc. R. Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773; *Louisville etc. R. Co. v. Johnson*, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372; *Burke v. Chicago etc. R. Co.*, 108 Ill. App. 565; *Illinois Cent. R. Co. v. Smith*, 85 Miss. 349, 37 South. 643, 107 Am. St. 345, 70 L. R. A. 642; *Baker v. Wilmington etc. R. Co.*, 118 N. C. 1015, 24 S. E. 415; *St. Louis etc. R. Co. v. Parks*

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Citations of Counsel.

(Tex. Civ. App.), 90 S. W. 343. Contributory negligence will not avail if the defendant, by the exercise of reasonable care, could have avoided the accident. *Kingston v. Ft. Wayne etc. R. Co.*, 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131; *Price v. St. Louis etc. R. Co.*, 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *St. Louis etc. R. Co. v. Parks*, and *Louisville etc. R. Co. v. Johnson*, *supra*; *Johnson v. Louisville etc. R. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. 39; *Louisville etc. R. Co. v. Gatewood*, 14 Ky. Law 108; *Louisville etc. R. Co. v. Ellis' Adm'r*, 97 Ky. 330, 30 S. W. 979. In the absence of direct testimony to prove suicide or illegal death, natural or accidental causes will be presumed. *Landon v. Preferred Accident Ins. Co.*, 43 App. Div. 487, 60 N. Y. S. 188; *Hancock Mutual Life Ins. Co. v. Moore*, 34 Mich. 41; *Chicago etc. R. Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990; *Knights Templar etc. Ind. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066; *Kelley v. Hannibal etc. R. Co.*, 70 Mo. 604; *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 67 N. W. 479, 58 Am. St. 709, 33 L. R. A. 598; *Potter v. New York Cent. R. Co.*, 19 N. Y. S. 862; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081; *Southern R. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395; *Supreme Tent etc. v. Stensland*, 206 Ill. 124, 68 N. E. 1089, 99 Am. St. 137.

Hughes, McMicken, Dovell & Ramsey, for respondent, contending, *inter alia*, that the jury was not entitled to speculate as to the manner of decedent's death, cited: *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Patton v. Texas etc. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Morrison v. Phillips etc. Construction Co.*, 44 Wis. 405; *Asbach v. Chicago etc. R. Co.*, 74 Iowa 248, 37 N. W. 182;

Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642; *Philadelphia etc. R. Co. v. Schertle*, 97 Pa. St. 450; *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655; *Hughes v. Cincinnati etc. R. Co.*, 91 Ky. 526, 16 S. W. 275; *Fritz v. Salt Lake etc. Light Co.*, 18 Utah 493, 56 Pac. 90; *Corcoran v. Boston etc. R. Co.*, 133 Mass. 507.

FULLERTON, J.—This action was brought to recover damages for the death of David Sullivan, who was the husband of the appellant Anna Sullivan, and father of the minor appellants. The death occurred by drowning, caused, it is alleged, by the negligence of the respondent.

The respondent operates street car lines in the city of Seattle, and suburban lines from that city to the neighboring towns. One of such lines extends from the city of Seattle in a northerly direction to Fremont. This line passes along the west edge of Lake Union, being constructed on an open trestle over the waters of the lake. The line where it crosses the lake is double tracked, the track to the east being used for cars outward bound from the city of Seattle, and the one to the west for those returning. Immediately to the west of the car line and separated from it by a railway, is a planked roadway known as the "Boulevard." At intervals along its car line where it parallels this roadway, the respondent has constructed platforms or stations opening into the roadway for the convenience of its passenger service. One of such stations, called Hinckley station, is constructed about midway of the lake. This station has an opening into the street of fifty feet in width, and is planked for the same width across the double tracks of the car line to some six or eight feet beyond, a distance from the roadway of some forty feet. It is surrounded, except where the car tracks enter and leave it, with a substantial railing.

On the evening of November 19, 1904, shortly before 10 o'clock, Mr. Sullivan boarded one of the respondent's cars in

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the city of Seattle at the junction of Seventh and Stewart streets, presumably to go to his home which was in Fremont. It is agreed by both sides that he was under the influence of liquor at the time, although the degree of his intoxication is a subject of controversy in the evidence. Mr. Sullivan first manifested his condition by insisting he had not received change for the coin he had tendered for his fare. After being appeased as to this, he remembered some duty he had not performed in the city of Seattle, and insisted on being let off the car, going so far as to give the emergency signal bringing the car to a full stop at once. The car stopped after it had entered on the Lake Union trestle, and the conductor deeming it unsafe in his condition to let him off at that place forcibly restrained him from leaving the car. This act of the conductor seemingly enraged Sullivan, and he expressed his feelings in vile and abusive language, refusing to cease even at the command of the conductor. The conductor finally told him he could get off at Hinckley station, and when the car reached that place he was permitted to alight on the side of the car opposite the roadway, that being the usual place for passengers to alight who get off of outward bound cars. Certain witnesses who were on the car testify that Mr. Sullivan walked in the direction of the roadway as the car started on its way. This is the last time he was seen alive. Some five days later his body was found in the waters of the lake directly below the south edge of the platform where it joins onto the planked roadway.

The negligence of the respondent, according to the contention of the appellants, consisted in permitting Sullivan to get off its car at Hinckley station, which place, they allege, was a dangerous place for one in his condition. The case was tried on this theory, and resulted in a verdict for the respondent. This appeal is from the judgment entered on the verdict.

The errors assigned relate to the refusal to give certain instructions requested by the appellants, and to the giving of certain others on the court's own motion. The instructions requested were ten in number and cover some fourteen pages of typewritten matter. But, without setting them out at length, their mere perusal shows that the court did not err in refusing to give them. Were they otherwise unobjectionable, their extreme length would alone justify the refusal to give them. But we think they were erroneous in other respects. In many places they assume as proved the very issue in controversy; in others they are argumentative, and as a whole so complicated and involved as to require as much elucidation as the facts of the case themselves. The giving of such instructions does not tend to enlighten the jury. The ordinary jury is composed of plain men, unfamiliar even with the language of the law, and to them an instruction is meaningless unless it be stated in plain and simple language, and be a clear, accurate, and concise statement of the law applicable to the facts of the case. No error was committed therefore in refusing to give the requested instructions.

The instructions given and excepted to are the following:

"The gist of this action is based upon the assumption that the deceased, David Sullivan, was in such a condition that he was helpless. I instruct you, in that respect, that if you find that the deceased, David Sullivan, was in such a condition of mind as to know that he wanted to get off at a certain stopping place of the defendant, and requested the defendant to let him off there, and that he was in such condition physically to get off the car, then it was the duty of the defendant to let him off at that place, and if the defendant let him off at that place, and the place was a reasonably safe place for the discharge of passengers, then the defendant performed its full duty to the deceased. If, however, you find that the deceased was in such a condition of intoxication that he was helpless, physically and mentally,

or either—absolutely helpless, then it would be the duty of the carrier to look after him, and if they let him off at that place, take some precautions to protect him, or carry him to some other place which would be safe and where it would be a proper place to put him off. It is not the duty of the common carrier to convey a drunken passenger around on its cars until he sobers up enough to—so that he becomes sober enough to discharge him without any danger to himself.

“If you find from the evidence that the deceased, David Sullivan, was in such a condition, mentally and physically, as to be unable to care for himself, and the defendant let him off in a place where it was reasonable to suspect that it was not ordinarily safe, and it was reasonable to suspect that he might come to harm, then the defendant would be responsible for that act, provided that the deceased’s own act did not contribute to the accident.

“The defense of contributory negligence is pleaded here, and the burden of proving contributory negligence is upon the defendant. I charge you that the mere fact of becoming intoxicated would not in itself constitute contributory negligence. It is the duty of a common carrier, so long as they carry a passenger in an intoxicated condition, to carry him as safely as any other passenger—if they know, to exercise greater care— A Juror: Explain that to us again. The Court: I say the fact of becoming intoxicated in itself does not constitute contributory negligence; that is, you cannot excuse any negligence on the part of the deceased after the time of his becoming intoxicated. If he was guilty of a negligent act after alighting from the car, the fact of his being intoxicated would not excuse that negligent act, because an act is an act of negligence irrespective of whether the person that makes it is intoxicated or not intoxicated; that is, an act which would be negligent—in a sober man would be equally an act of negligence on the part of an intoxicated man.

“If you find from the evidence that the deceased was in such a state of mind and body as to know that he wanted to get off said street car at this station and requested to be put off at that station and was able of his own free will

and without assistance to get off at that station, then I would instruct you that he was not in such a helpless condition as to make it negligence on the part of the defendant to let him off at that place. If, however, they permitted—put him off, or permitted him to get off, at a place that was dangerous to an ordinarily prudent man, then the company—the defendant would be responsible if anything happened to him by reason of their putting him off in an unsafe place.

“If you find that the deceased, David Sullivan, was negligent, and his own negligence contributed to his death, then the plaintiffs cannot recover in this case; but it is not proper for you to indulge in any speculations as to the degree of negligence chargeable to the company or chargeable to the deceased. If the deceased was guilty of any negligence which materially contributed to his death, the plaintiffs cannot recover, although you may find that the defendant may have been guilty of negligence which contributed to his death.

“There are no degrees of negligence recognized under the laws of this state. Negligence on the part of the deceased, which contributed to his injury—to his death, would bar the plaintiffs from recovering, although you might find that the defendant was also negligent. A Juror: The point I wanted to get at is, would a man that was able to cross the street—a man that was able to walk from the sidewalk and get onto a street car, is he in a helpless condition? The Court: I instruct you that a man that was capable of doing that and was capable to know where he wanted to go and where he wanted to get off, would not be in a helpless condition.”

Of these instructions we think the appellants justly complain. The court instructed the jury in effect, it will be noticed, that if the deceased was in such a condition of mind as to know that he wanted to get off at a particular place, and was physically able to get on and off the car, he was not in such a condition as to make it necessary for the respondent to exercise any greater degree of care towards him than it is required to exercise towards its normal passengers; that it is only when the passenger is “absolutely helpless” that the carrier owes a duty to look after him. But manifestly these cannot be absolute tests. Common ex-

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perience tells us that a man may know where he wishes to go, and be able to get on and off a street car without assistance, yet be so far incapacitated by intoxicants that it would be highly dangerous to him to leave him in an exposed and dangerous situation. No hard and fast rule can be laid down as to such cases. And it was for the jury in this case to determine from the entire evidence showing the defendant's condition, whether it was negligence to leave him at the place he was left by the respondents. The court drew the lines too narrowly. He should not have made absolute helplessness the sole test.

The instructions are faulty also in that they assume that acts which would be negligence if committed by sober persons are also negligence when committed by an intoxicated one. If this assumption were correct, then the carrier would owe no greater duty to an intoxicated passenger than it owes to a sober one. Any place that it could lawfully put off a sober passenger without liability it could also put off a drunken one. But all of the authorities are against this view. The rule is that a carrier owes to a passenger a duty commensurate with his condition. After it receives a passenger who is helpless or incapacitated it must exercise towards him that degree of care necessary to keep him from harm. A carrier is not obligated to receive a helpless, imbecile, or drunken person as a passenger, when unattended, but if it does so receive such a one, it must give him such care as will insure him a safe passage to some proper designation. It cannot lawfully put him off, or permit him to get off, at a place where there is danger of his perishing or coming to harm, even though such a place would be reasonably safe for one in a normal condition. In this case whether the carrier exercised this degree of care towards the deceased was a question for the jury, and the court erred in taking it from them.

The respondent contends that, notwithstanding there may be error in the instructions, the case must nevertheless be

affirmed, because the evidence was insufficient to make a case for the jury. But, under the uniform holdings of this court, this question cannot be reviewed on an appeal by the party in whose favor the ruling was made. *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360; *Id.*, 30 Wash. 154, 70 Pac. 255.

For errors in the instructions complained of, the cause is reversed and a new trial awarded.

HADLEY, RUDKIN, and CROW, JJ., concur.

[No. 6145. Decided September 25, 1906.]

In the Matter of Extending Howard Avenue North in the City of Seattle.

SEATTLE SCHOOL DISTRICT No 1, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—SCHOOL PROPERTY—EXEMPTION. The lots of a school district are subject to local improvement assessments under Laws 1893, p. 139, § 22, requiring cities to levy the assessment upon all property in the locality benefited by the improvement, in the absence of any expressed intent of the legislature to exempt such property, although school property is not in express terms directed to be assessed.

SAME—TAXATION. Const., art. 7, § 2, exempting school district property from taxation does not prohibit a special assessment against the same to the extent of benefits from a local improvement.

Appeal from an order of the superior court for King county, Morris, J., entered December 6, 1905, after a hearing on the merits, overruling objections and confirming a special assessment against school property for widening and extending a street. Affirmed.

Kenneth Mackintosh and *R. W. Prigmore*, for appellant.
Scott Calhoun and *O. A. Tucker*, for respondent.

¹Reported in 86 Pac. 1117.

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CROW, J.—Under authority of the eminent domain act applying to cities of the first class, ch. 84, Laws 1893, p. 189, Bal. Code, § 775 *et seq.* (P. C. § 5050), and ordinance No. 10,850, enacted in pursuance thereof, the city of Seattle instituted this proceeding to condemn lands for the purpose of laying off, widening, and extending Howard avenue. An assessment district was created, and an assessment made upon real estate specially benefited, to pay for the property taken and the costs of the proceeding. Objections being regularly heard by the superior court of King county, said assessment was in all respects confirmed. Six lots owned by Seattle School District No. 1, benefited by said improvement, were assessed. The school district filed its objections to said assessment, and now appeals from the order of the superior court confirming the same.

It appears that appellant's lots were used exclusively for public school purposes. Therefore the controlling question involved in this appeal is whether they were subject to assessment, or, in other words, whether the city of Seattle had power, acting through its commissioners appointed by the superior court, to impose an assessment upon them. The appellant contends (1) that under the constitution and laws of this state, no authority either express or implied is conferred upon the respondent city to assess the property of said school district, and (2) that by the express terms of the charter and ordinances of said city, the property of the school district is exempt from such assessments. It must be conceded that the eminent domain act above mentioned, under which the city has proceeded, does not by its express terms affirmatively direct that the school district shall be assessed. Section 2 of said act does direct, however, that if the ordinance enacted by the city shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, the proceedings for making

such special assessment shall be as in said act prescribed. Section 22 provides:

"It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that will be specially benefited thereby, and to estimate what proportion of the total cost of such improvements will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion; and having found said amounts to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement. . . ."

These sections and others in the act seem to contemplate that all benefited property located within the assessment district shall be assessed, without expressly excepting any property either public or private. The respondent contends that no such express exception having been made, appellant's property is liable. Appellant contends that, as the statute does not in so many words direct that public school property shall be assessed, authority to make an assessment does not exist, nor can it be implied. Well considered cases have been cited in the briefs supporting each of these contentions; there being an irreconcilable conflict of authority. Appellant, in support of its position, has cited, with others, the following cases: *Pittsburgh v. Sterrett Sub-district School*, 204 Pa. 635, 54 Atl. 463, 61 L. R. A. 183; *Clinton v. Henry County*, 115 Mo. 557, 22 S. W. 494, 37 Am. St. 415; *Sutton v. School of Montpelier*, 28 Ind. App. 315, 62 N. E. 710; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Witter v. Mission School District*, 121 Cal. 350, 53 Pac. 905, 66 Am. St. 33; *Harris County v. Boyd*, 70 Tex. 237, 7 S. W. 713.

The respondent cites, with others, the following cases: *Commissioners of Franklin County v. Ottawa*, 49 Kan. 747,

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31 Pac. 788, 22 Am. St. 396; *Edwards & Walsh Const. Co. v. Jasper County*, 117 Iowa 365, 90 N. W. 1006, 94 Am. St. 301; *Higgins v. Chicago*, 18 Ill. 276; *Scammon v. Chicago*, 42 Ill. 192; *County of McLean v. Bloomington*, 106 Ill. 209; *Adams County v. Quincy*, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; *Sioux City v. Independent School District*, 55 Iowa 150, 7 N. W. 488; *Hassan v. Rochester*, 67 N. Y. 528.

Our view is that the authorities cited by the respondent are the best founded in reason. We think that said eminent domain act, under which the city authorities have proceeded, must be held to impose upon the commissioners a legal duty to assess the property of the appellant in proportion to the benefits received. There is no contention that the lots have been improperly included within the assessment district, or that they have not been specially benefited by the improvement. Had the legislature in enacting the law of 1893 intended to exempt public school property from its just proportion of the burdens of said special assessment, it is only reasonable to assume that such intention would have been expressly declared in the words of the statute. An exemption of any portion of the benefited property located within the assessment district would necessarily cause an increased burden to be imposed upon other benefited property located therein, and in view of this result we should refrain from adopting a construction of the statute which would relieve appellant's property, especially when there is no good reason for holding that such an exemption was intended by the legislature. In *Edwards & Walsh Const. Co., v. Jasper County*, *supra*, the supreme court of Iowa said:

"While authority to levy such assessments is traceable to the taxing power, they are nevertheless assessed on the theory that the property against which they are levied is benefited thereby to the extent of the levy, and the municipality acts as an agent, merely, in collecting the tax. The district improved

is never coextensive with the county or city, and it is not true that in paying the assessment the county must raise money to pay over to itself, and that no one would be benefited but the officers employed in the collection of the tax. There is no reason why the county, the city, or the school district should not pay for the benefits received by it the same as any other property owner. Of course, their property may not be sold, but there is no reason why the amount of the tax should not be paid out of the treasuries of these institutions; and, if the governing bodies fail to make payment, mandamus will lie to compel them to do so."

Appellant contends that section 2, art. 7, of our state constitution, exempting school districts from taxation, prohibits the respondent city from making such assessment. The word "taxation," as used in said section, does not include special assessments of the character here involved. The law is well settled that exemption from taxation does not mean exemption from special assessments. *Board of Improvement v. School District*, 56 Ark. 354, 19 S. W. 969, 35 Am. St. 108; *Commissioners of Franklin County v. Ottawa*, *supra*; *Clinton v. Henry County*, *supra*; *Edwards & Walsh Const. Co. v. Jasper County*, *supra*.

In *Seanor v. County Commissioners*, 13 Wash. 48, 55, 42 Pac. 552, this court said:

" . . . we think the overwhelming weight of authority is that the assessment for benefits in such cases does not fall under the definition of the word 'tax' as used in the constitution—that the word 'tax' has reference to general revenues for the purpose of maintaining and carrying on the government where the benefits are alike enjoyed by all, and where no special benefits, as in the case of the assessment for improvements, are enjoyed. Of course, the idea of compensation is the basis of all theories of taxation, but an element of special benefits enters into the one, and is the distinguishing feature between taxes and assessments for benefits."

In *Edwards & Walsh Const. Co. v. Jasper County*, *supra*, at page 381, the Iowa court, in summing up a discussion of this distinction between taxes and special assessments and in

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commenting upon the power of a city to levy such special assessments against the property of a county, said:

"True, the right to levy these assessments is referable to the power of taxation, but statutes exempting property from general taxation are almost universally held inapplicable to special assessments. See cases heretofore cited. Reduced to its last analysis, the question is one of power in the city to levy the assessment against the county property. The statute giving the power is broad enough to cover lots or lands owned by municipal or *quasi* municipal corporations, and, if there be any exemption, it is to be implied, unless we hold with those courts which say that county or state property is not to be included unless expressly mentioned, or by necessary implication inferred. We are not disposed to apply this last-mentioned rule in construing our statutes. Such property is expressly exempted from general taxation, but no such exemption is made from special assessments. Even without a statute, property devoted to governmental use would not, in the absence of express authority, be taxed, and the fact that it is expressly exempted in one case and not in the other is strong evidence that the legislature did not intend to exempt it from special assessments."

Appellant further contends that subd. 3, of § 11, of art. 8, of the charter of the city of Seattle, and certain ordinances cited in the briefs, expressly exempt school districts from special assessments. We think said section of the charter and said ordinances do not apply to this case. Here the proceedings instituted by the city and culminating in the assessment complained of, are only authorized by the eminent domain act of 1893 above mentioned, while the charter and ordinance provisions relied on by appellant refer only to local improvements of an entirely different character. The statute under which these proceedings have been conducted must control in this case. The proceedings under consideration here were originally instituted before chapter 55, Laws 1905, page 84, was enacted; hence our discussion has been based entirely upon the law of 1893.

After a most careful consideration of all the assignments of error, and legal questions presented by the appellant, and having examined all the authorities cited by it, including its list of additional authorities supplemental to its opening and reply briefs, we are unable to conclude that any error has been committed by the honorable trial court. The judgment is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, and ROOT, JJ., concur.
FULLERTON, J., dissents.

[No. 8209. Decided September 25, 1906.]

KNUDSON-JACOB COMPANY, *Appellant*, v. A. M. BRANDT
et al., *Respondents*, GROVE E. SLY *et al.*,
Defendants.¹

MECHANICS' LIENS—FORECLOSURE—EVIDENCE—DELIVERY OF MATERIAL. In an action to foreclose a mechanics' lien, there is not sufficient evidence of delivery of the material at the property in question, where the only testimony was that some of the material was given the appellant's deliveryman with directions for delivery, and most of it to a subcontractor, the contractor being engaged in a number of houses, and neither the deliveryman or subcontractor were called to testify.

SAME—AMOUNT. In an action to foreclose a mechanics' lien, there is not sufficient evidence of the amount to be charged to the property, where there was but one general account for different houses, charging various items to the contractor, with general credits, from which it could not be clearly ascertained what was chargeable against the property, or what amount remained unpaid.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 27, 1905, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to enforce a materialman's lien. Affirmed.

E. L. Sanders, for appellant.

Hamblen, Lund & Gilbert, for respondents.

¹Reported in 87 Pac. 43.

HADLEY, J.—This is an action to foreclose a lien for material alleged to have been used in the construction of a certain building. The material consisted of building hardware and paints, and it is alleged that the plaintiff furnished the same at the special instance and request of the defendant Sly, to be used in the construction of a building on lot 9, block 33, of Second Sinto Addition to Spokane Falls, now Spokane. It is also alleged that the defendants A. M. Brandt and wife are the owners and reputed owners of the lot, and that said Sly was the contractor in charge of the construction of the building. The usual averments concerning the filing of a lien notice are made, and a balance of \$115.85 is claimed as due and unpaid. The complaint also contains certain allegations concerning a mortgage upon said property said to have been executed by said Brandt and wife to the Netherlands American Mortgage Bank, to secure the sum of \$3,250, which it is charged was fraudulently made. Said Brandt and wife answered the complaint, denying the material allegations thereof and affirmatively alleging that the goods were sold to said Sly upon general account with the intention of holding him personally, without reference to any particular property upon which the same was to be used and without any intention of claiming a lien therefor. Also, that before the commencement of suit, said Sly had fully paid for all materials mentioned in the complaint. It is conceded that the said bank also appeared and answered, but the answer was not brought up with the record and it does not appear what issue was made thereby. The cause was tried by the court and resulted in a judgment dismissing the action and awarding costs to Brandt and wife and said bank. The plaintiff has appealed.

It is assigned that the court erred in refusing the admission in evidence of appellant's daybooks, containing the items involved in the suit, and in holding that appellant's memorandum and delivery slips were books of original entry and the best evidence. Appellant was, however, able to produce,

and did produce, the memorandum slips showing all the items claimed except certain small items amounting to \$6.40. Moreover, the record sufficiently shows that the remaining items were included in the daybooks. If appellant were entitled to enforce this lien for any amount, the competency of the evidence as to the somewhat inconsiderable amount of \$6.40 should be considered, but inasmuch as we think the lien cannot be sustained for other reasons, the competency of this evidence becomes immaterial for the determination of the appeal.

Some technical reasons are urged by respondents against the enforcement of the lien, by way of informality in the notice of lien, variance as to ownership, and the inclusion of nonlienable articles. We shall, however, pass over these and discuss what we consider more serious matters affecting the essence of appellant's claim for a lien. We think the proof is not satisfactory as to the actual delivery of the material at the property in question, and that it was actually used thereon. The testimony of the president of the appellant corporation upon that subject was that he knew nothing more about the delivery than that some of the goods were given to appellant's deliveryman with slips specifying the property in question as the place of delivery. The deliveryman did not testify. The larger part of the material was delivered to one Fuller by direction of Sly. Fuller was a subcontractor of Sly's for painting. Sly was at the time engaged in constructing a number of other houses to which appellant was sending materials on his account. Fuller did not testify, so that it does not appear what painting material went to his building. We think the evidence upon this subject is too indefinite and uncertain to charge the property with a lien.

Moreover the goods sold for the different houses were all charged to Sly in one general account. There were here and there extending through the account certain notations indicating that materials were delivered to different houses, and

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many items are shown to have been delivered at Sly's shop, for what purposes does not appear. Sly's credits for payments were, however, entered generally in the account. No separate account for payments applicable to each building was kept. There was some evidence of the special application of some payments, but they were, in any event, entered as credits upon the general account. We therefore find it impossible to determine satisfactorily to ourselves what, if any amount, should be charged against this property. The burden of proof was upon appellant, and the account should have been so kept that it could have been clearly ascertained what was chargeable against the property. The court found that appellant furnished materials to Sly upon various building contracts of which this was one, and that they were sold upon general account to Sly upon his sole responsibility and without any intention on the part of appellant of claiming liens upon the property. Under the later decisions of this court, the absence of intention at the time the goods were sold, to assert a lien, would not have precluded its enforcement afterwards if the goods were actually sold for the understood purpose of being used in the building and if they were so used, unless the right to a lien was waived. *Stringham v. Davis*, 23 Wash. 568, 63 Pac. 230; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966. But in such event it must be clearly shown that the material was used in the building, and what amount of the purchase price remains unpaid.

It is assigned that the court erred in dismissing the complaint against the Netherlands American Mortgage Bank. No evidence was introduced in support of the allegations of the complaint against the bank, and its answer was not brought up with the record. There is, therefore, nothing here for our consideration upon that subject.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 6080. Decided September 25, 1906.]

F. E. CREECH *et al.*, *Respondents*, v. THE CITY OF ABERDEEN,
Appellant.¹

APPEAL—EXCEPTIONS—AMENDMENT OF PLEADINGS. Error cannot be predicated upon the allowance of an amendment changing the nature of the action when no exceptions were taken thereto.

CONTINUANCE—NEW TRIAL—ABSENCE OF WITNESS—CUMULATIVE TESTIMONY. It is not an abuse of discretion to refuse a motion for a continuance or grant a new trial, where it does not appear that the evidence sought from an absent witness was not cumulative, and opportunity was given to take his deposition.

JURY—CHALLENGES—HARMLESS ERROR. Error of the court in allowing a fourth peremptory challenge is harmless where it does not appear that the jury was rendered partial by the mistake, and the last juror was passed for cause.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 19, 1905, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

R. E. Taggart and Ben Sheeks, for appellant.

John C. Hogan and W. H. Abel, for respondents.

DUNBAR, J.—This is an action to recover upon a contract for laying water pipe under the Chehalis river, and for damages alleged to have been caused by the city having furnished defective material. Under the contract the work was to be done by the respondents, and the material to be furnished by the city, the appellant.

It is difficult to tell from appellant's brief exactly what the contentions are, as there is no statement of the case and the assignments are not regularly made. The first contention seems to be that the court erred in refusing to grant a continuance. It is asserted that four days before the date set for the trial, the plaintiffs were permitted by the court

¹Reported in 87 Pac. 44.

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to amend their complaint, changing the nature of the second cause of action: that this amendment was allowed over the objection of the defendant, and without any other notice than that given to Mr. Taggart, one of the attorneys for the appellant at the time, who happened to be in attendance on the court. Conceding, without deciding, that the amendment did change the nature of the cause of action, it seems that there was no exception taken to the ruling of the court in denying the motion for continuance. The attorney for the appellant made an affidavit of certain things which he expected to prove by a Mr. Wilson, who was not able to attend court at the time of the trial, and this affidavit was the basis of the motion for continuance. But an investigation of the record shows that one of the attorneys for the respondents, who was first advised by Mr. Wilson that he would not like to attend the court on the day the trial was set for, advised him to report to Mr. Taggart, and informed Mr. Taggart of Mr. Wilson's communication, and suggested that Wilson's deposition be taken, and that he would waive all formalities. This was not done, nor, upon an examination of Mr. Taggart, would he assert that the testimony which he expected to adduce by the witness Wilson was not cumulative; and the record shows that the facts which he indicated that he would prove by Mr. Wilson were sworn to by a great many other witnesses, whom the appellant produced at the trial. Under all the circumstances, we cannot say that the court abused the discretion which is vested in it in such cases. Nor can we find any abuse of discretion of the court in refusing motion for new trial upon the showing made.

It is also contended that the court committed error in allowing respondents to exercise a fourth peremptory challenge. It seems that in impaneling the jury, one James Phillips, a juror, was called, who was challenged by the appellant for cause, and the challenge was sustained. After

this the court permitted the respondents to exercise a fourth peremptory challenge, to the allowance of which appellant excepted. It does not appear that the jury was rendered partial by this mistake on the part of the court, the juror who took the place of the juror who was challenged being examined and passed for cause. All that the appellant can claim is the right to have its case tried by an impartial jury. It was said by the supreme court of Mississippi, in the case of *State Use of Barnett v. Dalton*, 69 Miss. 611, 10 South. 578:

"The action of the court in permitting to appellee a fifth peremptory challenge was erroneous, but the error is not reversible. The plaintiff, as has long been held in this state, had no vested right in any particular juror. He had a right to an impartial jury, and this right seems to have been enjoyed by him."

It has frequently been decided by this court that litigants had no vested right in any particular juror, and in passing upon the laws in relation to the selection of jurors it was said, in *State v. Straub*, 16 Wash. 111, 47 Pac. 227:

"This court has held so many times, that it seems that we ought not to be called upon to further discuss this character of questions, that these conditions in regard to the selection of jurors are directory, and that no litigant has a vested right in the procedure. Certainly, in the absence of a showing that a material interest had been affected, the judgment would not be reversed for an irregularity so far as the procedure is concerned."

An examination of the record leads us to conclude that no prejudicial error was committed by the court in the admission or rejection of testimony, or in the giving of instructions.

The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, and HADLEY, JJ., concur.

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[No. 3223. Decided September 25, 1906.]

**BELGRAVE R. ATKINSON *et al.*, Respondents, v. WASHINGTON
IRRIGATION COMPANY, Appellant.¹**

PUBLIC LANDS—RIGHTS OF SETTLER BEFORE PATENT—WATERS AND WATER COURSES — APPROPRIATION — IRRIGATING CANAL — INJUNCTION. United States Rev. Stats., §§ 2339 and 2340, recognizing the right to appropriate water according to local customs, subject to the payment of damages to settlers on the public domain, and declaring that patents shall issue subject to vested or accrued water rights, does not confer the right upon an irrigation company to dig a canal across the lands of a settler after the initiation of his homestead entry, or confine the settler to an action for damages after issuance of the patent, but injunction lies to prevent the use of such canal unless a right of way be condemned by the irrigation company.

SAME—ESTOPPEL—SUFFERING CONSTRUCTION OF CANAL. The fact that a settler on the public domain suffers an irrigation company to dig a canal across the land after the initiation of his homestead entry, will not estop him from enjoining the use of the canal after the issuance of the patent from the government.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered January 10, 1905, in favor of the plaintiffs, after a trial on the merits before the court without a jury, enjoining the operation of an irrigation ditch across plaintiffs' land. Affirmed.

E. F. Blaine and Ira P. Englehart, for appellant.

William B. Bridgman, for respondents.

DUNBAR, J. — Excluding all immaterial statements, the plaintiffs brought an action to enjoin the defendant from conducting an irrigation ditch over their land in Yakima county. It appears from the record and the findings of fact that the land in question was government land of the United States on the 18th day of June, 1898, and that on that date the plaintiff, who is one of the respondents here, Belgrave R. Atkinson, filed his homestead entry on it, and

¹Reported in 86 Pac. 1123.

afterwards on the 10th day of July, 1903, made final proof, and patent was issued to him for this land on the 13th day of July, 1904. During the year 1902, before the plaintiffs had made final proof on the land and two years before they had received a patent for it, the defendant constructed a lateral ditch across the plaintiffs' land. We do not find it necessary or pertinent to mention the other ditches which are discussed in defendant's brief, for the reason that they are not in controversy in this suit. The plaintiffs permitted the defendant to build this lateral ditch across their land in the year 1902; that is, they made no objection, and made no claim against the defendant company prior to the commencement of this action for an injunction. No claim has been made for damages from the defendant, and no damages are asked in this action. The relief prayed for is injunctive relief, the complaint being that the defendant is using plaintiffs' property without making compensation therefor and without due process of law. The court found that the plaintiffs were entitled to have a decree entered, enjoining the defendant from using and occupying said strip of land used and occupied by it in the maintenance and operation of the canal described in the complaint; but that the defendant be given thirty days from and after the date of the judgment in which to appear in the action and file an amended answer therein or commence an independent proceeding to condemn a right of way for said canal, and that the injunctive relief be suspended until the expiration of said thirty days; and judgment was entered accordingly. From this judgment the appeal is taken.

The appellant's claim is based upon §§ 2339 and 2340, Revised Statutes of the United States, which are as follows:

"Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such

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vested rights shall be maintained and protected in the same; and the rights of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured, for such injury or damage.

"Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as have been acquired under or recognized by the preceding section."

It is the contention of the appellant that the irrigation company, having built its lateral canal before patent was issued to the respondents, their patent is subject to the rights of the appellant which had vested before such patent was issued. The principal case relied upon is *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039, and that case does hold that, under the statutes quoted, the patent issues in subjection to the rights of the irrigation company, where the canal had been constructed before the issuance of the patent but after the filing by the homestead applicant. But this case we think stands alone in this extreme construction of the statute. Colorado, no doubt, by reason of its extreme arid condition, has gone further in the protection of water rights to irrigating canals than any other state. But this, it seems to us, is an unnatural construction of §§ 2339 and 2340, and the question of when rights have vested and accrued still remains. They had not vested and accrued by priority of possession or otherwise at the time the respondent had filed his homestead claim upon this land, and when a citizen of the United States makes a homestead filing, there is an implied contract that when he meets the requirements of the homestead laws with reference to residence, cultivation, improvements, etc., the government will invest him with the legal title. Certainly it was not the intention of Congress in the passage of the acts above quoted to allow

others, pending the consummation of the initiated rights, to invade the settler's possession, thus rendering nugatory the implied contract upon which the homestead applicant had acted and expended his time and money in making improvements, etc., and make uncertain the final disposition of the soil. And there seems to be no more reason for allowing this invasion of right by an irrigation company than by any one else. The irrigation of arid lands is important, but the project does not possess exclusive importance.

In the state of California the decisions rendered have been exactly contrary to the Colorado case. There it was held in *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384, which is the leading case in the state and a case most excellently reasoned, that the statutes above quoted do not confer the right upon an appropriator of water on public land to go upon land after its entry by another as a homestead but before the claimant had made final proof, and change the point of diversion or construct new ditches or in any way to interfere with the initiatory rights of the homestead applicant. *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, holds that the filing of a homestead entry of a tract across which a stream of water runs in its natural channel with no right or claim of right to divert it therefrom, confers a right to have the stream continue running in that channel without diversion, which right, when completed by full compliance with the requirements of the statutes on the part of the settler, relates back to the date of the filing, and cuts off intervening adverse claims to the water. The reasoning in this case would apply equally to the relation back of the right of the homestead entryman to the land conveyed to him by the patent. The same principle was laid down by this court in *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062, in construing practically the same kind of a statute. So far as the question of estoppel is concerned, by reason of the respondents having made no objection to the

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Citations of Counsel.

digging of a canal, that question was decided adversely to appellant's contention by this court in *Hathaway v. Yakima Water etc. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847.

The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, HADLEY, and FULLERTON, JJ., concur.

[No. 6130. Decided September 25, 1906.]

C. E. McAVOY, *Respondent*, v. I. H. JENNINGS, *Appellant*.¹

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—COMPLAINT—INSOLVENCY. The complaint in an action by a creditor to set aside a fraudulent composition with creditors is demurrable where it fails to allege either the insolvency of the debtors or an execution and return of *nulla bona*.

SAME—PREFERENCES. A debtor in failing circumstances may make a preference to a portion of his creditors, transferring his property to a trustee for equal division among such of the creditors as will stipulate to discharge their claims upon receiving their pro rata share of the assets.

SAME—SALES IN BULK—COMPOSITIONS WITH CREDITORS. A transfer of a stock of goods to a trustee, to be sold and applied to debts as a composition with all creditors who would discharge their claims upon receiving their pro rata share of the proceeds, is not a sale of goods in bulk within the meaning of Laws 1901, p. 222, regulating such sales.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 17, 1905, in favor of the plaintiff, a creditor, against the garnishee defendant, an assignee for the benefit of creditors. Reversed.

Gray & Stern, for appellant. An assignment for the benefit of creditors with a proviso for a release of claims is valid. *Patty-Joier & Eubank Co. v. Cummins*, 93 Tex. 598, 57 S. W. 566; *Robinson v. Rapelye and Smith*, 2 Stew. (Ala.) 86; *Todd v. Buckman*, 11 Me. 41; *Halsey v. Whitney*, 4 Mason 206; *Coakley v. Weil*, 47 Md. 277; *Smith v. Millett*,

¹Reported in 87 Pac. 53.

11 R. I. 528; *Kellogg v. Cayce*, 84 Texas 213, 19 S. W. 388; *Gordon v. Canonn*, 18 Gratt. (Va.) 387; *Clarke & Co. v. Figgins*, 27 W. Va. 663; *Brashear v. West*, 7 Pet. 608, 8 L. Ed. 589; *Pearpoint v. Graham*, Fed. Cas. No. 10,877; *Victor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; *Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. 256; *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; *Benham v. Ham*, 5 Wash. 128, 31 Pac. 459, 34 Am. St. 851; *Furth v. Snell*, 6 Wash. 542, 33 Pac. 830; *Samuel v. Kittenger*, 6 Wash. 261, 33 Pac. 509; *Bump*, *Fraudulent Conveyances* (3d ed.), 186.

John W. Roberts, for respondent, in contending that the assignment was void, cited: 4 Cyc. 191; *Patty-Joiner & Eubank Co. v. Cummins*, 93 Tex. 598, 57 S. W. 566; *Lawrence v. Horton*, 15 Fed. 853; *Muller v. Norton*, 19 Fed. 719; *Jaffray v. McGehee*, 107 U. S. 361, 2 Sup. Ct. 367, 27 L. Ed. 495; *Keevil v. Donaldson*, 20 Kan. 165; *Donoho v. Fish Bros. & Co.*, 58 Tex. 168; *Pearson v. Crosby*, 23 Me. 261; *Vose v. Holcomb*, 31 Me. 407; *Todd v. Bucknam*, 11 Me. 41; *Collier v. Davis*, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758; *Robinson v. Belt*, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65; *Duggan v. Bliss*, 4 Colo. 223, 34 Am. Rep. 80; *Atkinson v. Jordan*, 5 Ohio 293, 24 Am. Dec. 281; *Greeley v. Dixon*, 21 Fla. 413, 58 Am. Rep. 673; *Grover v. Wakeman*, 11 Wend. 187, 25 Am. Dec. 624; *Hubbard v. McNaughton*, 43 Mich. 220, 5 N. W. 293, 38 Am. Rep. 176; *Curtain v. Talley*, 46 Fed. 580; *Müller v. Conklin & Co.*, 17 Ga. 430, 63 Am. Dec. 248; *McBride v. Bohanan*, 50 Ga. 527; *Francis v. Herz & Co.*, 55 Ga. 249; *Hurd v. Silsby*, 10 N. H. 108, 34 Am. Dec. 142; *McReynolds v. Dedman*, 47 Ark. 347, 1 S. W. 552; *McConnell v. Rakness*, 41 Minn. 3, 42 N. W. 539; *Brown v. Knox*, 6 Mo. 302; *Drake v. Rogers*, 6 Mo. 317; *Bradley v. Ames*, 50 Mo. 387; *Jeffries v. Bleckmann*, 86 Mo. 350; *May v. Walker*, 35 Minn. 194, 28 N. W. 252; *Nesbitt v. Digby*, 13 Ill. 388; *Howell v. Edgar*, 3 Scam. 417; *Wilson's Accounts*,

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4 Pa. St. 430, 45 Am. Dec. 701; *Widgery v. Haskell*, 5 Mass. 144, 4 Am. Dec. 41; *Spaulding v. Strang*, 38 N. Y. 9; *Borden v. Sumner*, 4 Pick. 265, 16 Am. Dec. 341, and note; *Graves v. Roy*, 13 La. 454, 33 Am. Dec. 568; Burrill, Assignments, §§ 192, 193; *Stewart v. Spenser*, Fed. Cas. No. 13,437; *Marsh v. Bennett*, 5 McLean 117, 128; *Ware v. Wanless*, 2 Wyo. 144; *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770; *Orr & Lindsey Shoe Co. v. Ferrell*, 68 Tex. 638, 5 S. W. 490; *Cleveland v. Battle*, 68 Tex. 111, 3 S. W. 681.

DUNBAR, J.—On November 19, 1903, M. J. Harkins, L. W. Harkins and E. E. Harkins, copartners under the firm name of The Harkins Company, executed with I. H. Jennings, the appellant herein, a certain agreement in writing. This agreement was to the effect that the Harkinses had been carrying on a general grocery business, and had incurred debts which were enumerated in a list of creditors attached to the agreement, stating that, desiring to pay off such debts, they turned over their property to Jennings on the condition that he should collect the book accounts, sell the property and, after deducting the expenses of such business, apply the proceeds remaining, equally and ratably among the list of creditors, with this provision:

“Provided, however, that each creditor, before being entitled to receive his pro rata under the terms of this agreement, shall deliver to the party of the second part a release of all claims against the said parties of the first part.”

This agreement in full may be found in the case of *McAvoy v. Jennings*, reported in 39 Wash. 109, 81 Pac. 77. The instrument was signed, sealed and executed by The Harkins Company and by Jennings, and the list of creditors for whose benefit the transfer was made was attached. Immediately upon the execution of this agreement, Jennings took possession of the assets mentioned therein, sold the tangible property, and proceeded with the collection of the

book accounts. The American Savings Bank & Trust Company was one of the creditors included in the list attached to the trust deed.

After the transfer to Jennings had been made, the bank assigned its claim to McAvoy, the respondent herein, who commenced an action in the superior court of King county to reduce the claim to judgment against the members of The Harkins Company. In that action McAvoy caused Jennings to be summoned as garnishee. Jennings answered, denying any indebtedness to the defendants, or the possession of any property belonging to them; but by way of further and explanatory answer, set forth fully the trust deed and all other facts above recited, and showed that, at the time of the service of the writ of garnishment upon him, he had in his hands the sum of \$850, which he was prepared to pro rate among the creditors in accordance with the terms and conditions of the written agreement, and asked for a discharge. The plaintiff filed an affidavit controverting the answer of the garnishee, in which he admitted all the affirmative facts recited by the garnishee, but alleged that the transaction between The Harkins Company and Jennings was fraudulent and void as to creditors, because it was without consideration and because there had been no compliance with the sales-in-bulk law. The controverting affidavit further denied that the transfer was made with the consent of all the creditors, or that the plaintiff or his assignor had knowledge of, or consented to, or ratified, the transfer; alleged that the transfer was made to hinder, delay and defraud creditors; and prayed that the garnishee be held upon his answer, and that judgment be rendered against him in favor of plaintiff. Upon this issue a trial was had before the court, but there was no testimony advanced which it is necessary to consider; so that the case must be determined upon the character of the written agreement itself. The court decided in favor of plaintiff and against the garnishee, for the full amount of plaintiff's

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judgment against the original defendants. From the judgment entered against the garnishee defendant, this appeal is prosecuted.

Without setting up the findings of fact and conclusions of law, we will proceed at once to discuss the legal propositions involved. It is contended by the appellant that, inasmuch as there is no allegation in the controverting affidavit of the respondent and no proof offered to show that the defendants, The Harkins Company, were insolvent at the time this trust deed was made, the respondent will not be heard to assail the validity of the deed. And unquestionably that has been the uniform holding of this court. This was decided in *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. 56, 15 L. R. A. 784, in which the court quoted approvingly from *Pearson v. Maxfield*, 51 Iowa 76, 50 N. W. 77, where it was said:

"If at the time of the issuance of the execution, the execution debtor had other property out of which the execution could have been satisfied, the plaintiff should have levied upon such property instead of upon the property in question, which could be effectually reached only through the aid of a court of equity."

This court added:

"Of course, if it is necessary to prove insolvency, it is necessary to allege it, as the defendant has a right to prepare his defense with reference to the allegations of the complaint, . . . we decide that this kind of an action cannot be sustained without an allegation and proof that there was no other property of the judgment debtor at the time of the conveyance out of which the creditor could satisfy his judgment or claim, and that, therefore, the complaint does not state facts sufficient to constitute a cause of action."

See, also, *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 333, 32 Pac. 92, where it was said by this court:

"If this is to be regarded as an action to set aside a fraudulent conveyance, the complaint is plainly insufficient, for it is neither based upon a return of *nulla bona*, nor an allegation that there was no other property out of which

plaintiff's claim could be satisfied. Courts will not enter into an investigation of the merits or demerits of a conveyance at the instance of any petitioner, until it appears that he has some interest in the determination of that question, and he cannot have any practical interest if the debtor has other property which will respond to his execution. His right is limited to the satisfaction of his claim; it does not extend to enforcing its satisfaction out of some particular property of the debtor."

There must be either an allegation of insolvency or an allegation of the issuance of an execution and return of *nulla bona*, which implies insolvency.

But, lest the action should be commenced again and these allegations made, we think it best to determine the main question in the case, viz., was the agreement above set forth void by reason of the proviso therein that each creditor before being entitled to receive his pro rata should deliver to the party of the second part a release of all his claims? Upon this question there is a hopeless division of authority; but while this particular question has never been decided by this court, we have decided uniformly that an insolvent debtor had a right to prefer creditors. This rule was first laid down in *Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. 256, where it was decided that, under the laws of this state, a debtor in failing circumstances could mortgage his entire property to secure *bona fide* debts to a portion of his creditors, and leave the debts due other creditors unsatisfied, the court in the course of its remarks saying:

"There is no law in this state to prevent a debtor, even though he be in failing circumstances, from paying or securing a portion of his creditors, so long as he does so in good faith, although he should dispose of his entire property in that way, and leave other debts unsatisfied."

There is no question raised in this case that the debts which were sought to be paid were not honest debts, or that there was any attempt to defraud any other creditors by the payments of dishonest debts; but the sole contention is that the

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debtor had no right to stipulate that the creditor, as a condition of receiving his pro rata, deliver to the debtor a release of all claims against him. To the effect that the debtor had the power in this state to prefer his creditors, see, also, *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; *Benham v. Ham*, 5 Wash. 128, 31 Pac. 459, 34 Am. St. 851; *Furth v. Snell*, 6 Wash. 542, 33 Pac. 830; *Samuel v. Kittenger*, 6 Wash. 261, 33 Pac. 509. And this same doctrine was reannounced in *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297, in a case where practically the same transaction was had as in the case at bar. There it was again said:

"It is the established law of this state that an individual, although insolvent or in failing circumstances, may pay or secure one or more creditors to the exclusion of others equally meritorious, even if by so doing he exhausts the whole of his property."

It was also said that the manner of giving the preference was immaterial; that it might be given by deed or in any mode which effects a legal transfer of the property, and that partners had the same right that individuals have, citing *Bump on Fraudulent Conveyances* (3d ed.), page 186. It was further said:

"The right to prefer manifestly involves the right to designate the creditors, or class of creditors, to be preferred; and it therefore follows that the only ground on which the unpreferred creditors can justly complain is that the claims of the preferred creditors are not *bona fide* and real."

Then, if an insolvent debtor has a right to prefer one class of creditors to the extent of the absolute exclusion of another class, by a diversion of the funds of the estate by payments made to the preferred class which exhausts such funds, it must follow that he has a right to make such payments upon such terms as he sees fit to impose. If the terms are not agreed to by the creditor, the only result is that he will not become a preferred creditor. In this instance, if the respondent-

ent's assignor, the bank, had not been incorporated in the agreement by being placed upon the list of creditors to whom the payments should be made, he could not have complained under the law which has been announced by this court. He certainly is not in any better position by reason of his having been placed among the creditors. The right, in the absence of a fraud upon the creditors by payment of claims which are not *bona fide*, to make such payments as the debtor sees fit to make, it seems to us must logically carry with it the right to make the agreement which is the basis of this action.

The contention that the transfer was void by reason of its being in contravention of what is termed the "sales-in-bulk" law, chapter 109, page 222, Laws of 1901, is untenable, for the reason that this was not a sale within the contemplation of that act. The object of that law was to prevent the vendor, generally a retail merchant, from escaping his responsibilities to his creditors by disposing of all his stock, pocketing the proceeds, and leaving his creditors without redress. But in this case Jennings did not purchase the stock and, under the terms of the agreement, was not to pay any portion of the value of the stock, of which he took possession, to the owners. But he simply acted as a trustee, so far as the goods assigned to him went, for the benefit of the creditors. Even if the transaction could be construed to fall within the scope and intention of that act, the fact that it failed to comply with all of the provisions of the act would not render all of the proceeds available to the respondent to the exclusion or injury of all the other creditors; for, under such circumstances, the purchaser would simply be held to be a trustee for the benefit of all the creditors. *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003; *Kohn v. Fishbach*, 36 Wash. 69, 78 Pac. 199, 104 Am. St. 941. The other minor objections raised to the validity of the agreement we think are without force.

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Citations of Counsel.

This judgment must be reversed and the respondent will be allowed, if he sees fit, to receive his pro rata distribution of the estate under the terms of the agreement.

MOUNT, C. J., CROW, HADLEY, and FULLERTON, JJ., concur.

[No. 6231. Decided September 25, 1906.]

P. GANNON, *Respondent*, v. WILLIAM E. SEEHORN,
Appellant.¹

WAREHOUSEMEN—STORAGE RECEIPT—PROVISIONS AS TO VALUE—COMPLIANCE WITH CONDITIONS. A provision in a warehouse receipt exempting the bailee from liability for over twenty-five dollars for loss of the goods unless "the true value of each box contents or thing is herein stated," is sufficiently complied with where the value of the contents is plainly marked on the box at the time of its delivery; and if technically the value was intended to be stated in the receipt, it was the duty of the bailor to have incorporated therein the stated value; hence upon loss, the damages cannot be limited to twenty-five dollars.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered February 10, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the value of goods delivered to a storage company. *Affirmed*.

Merritt & Merritt, for appellant. The receipt constituted a contract controlling the rights of the parties. *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 688, 50 Pac. 847; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 181; *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Pac. 665, 26 Am. St. 107; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Stewart v. Cleveland etc. R. Co.*, 21 Ind. App. 218, 52 N. E. 89; *Hengstler v. Flint etc. R. Co.*, 125 Mich. 530, 84 N. W. 1067; *Johnstone v. Richmond etc. R. Co.*, 39 S. C.

¹Reported in 86 Pac. 1116.

55, 17 S. E. 512; *Atchinson etc. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148; *Richmond etc. R. Co. v. Richardson*, 23 Ky. Law 2234, 66 S. W. 1035. A common carrier may, by special contract, limit his common law liability. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Hill v. Northern Pacific R. Co.*, 33 Wash. 697, 74 Pac. 1054; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870; *Graves v. Lake Shore etc. R. Co.*, 137 Mass. 33, 50 Am. Rep. 282; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *Id.*, 70 N. Y. 410, 26 Am. Rep. 608; *Duntley v. Boston etc. R. Co.*, 66 N. H. 263, 20 Atl. 327, 49 Am. St. 610, 9 L. R. A. 449; *Hill v. Boston etc. R. Co.*, 144 Mass. 284, 10 N. E. 836; *Durgin v. American Express Co.*, 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; *Fairchild v. Philadelphia etc. R. Co.*, 148 Pa. St. 527, 24 Atl. 79; *Railway Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Richmond etc. R. Co. v. Payne*, 86 Va. 481, 10 S. E. 749, 6 L. R. A. 849.

E. H. Belden and *W. C. Losey*, for respondent. The attempted limitation was void and the appellant became subject to his common law liability as a warehouseman. *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Allen & Gilbert-Ramaker Co. v. Canadian Pacific R. Co.*, 42 Wash. 64, 84 Pac. 620; *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; *Merchants' Despatch Transportation Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624, 41 Am. St. 265; *Judson v. Western R. Co.*, 6 Allen 486, 83 Am. Dec. 646; *Burnell v. New York Central R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61; *Black v. Goodrich Transportation Co.*, 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; *Powers v. Chicago etc. R. Co.*, 130 Iowa 615, 105 N. W. 345; 3 Am. & Eng. Ency. Law (2d ed.), 150; *Steers v. Liverpool etc. S. S. Co.*, 57 N. Y. 1, 15 Am. Rep. 453; *Abrams v. Milwaukee etc. R. Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. 55; *Louisville etc. R. Co. v. Owen*, 93 Ky. 201, 19 S. W. 590; *Moulton v. St. Paul etc.*

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R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; *Boehl v. Chicago etc. R. Co.*, 44 Minn. 191, 46 N. W. 333; *Southern Express Co. v. Moon*, 39 Miss. 822; *Chicago etc. R. Co. v. Abels*, 60 Miss. 1017. The attempted limitations are no protection when it clearly appears that appellant had actual notice of the value of the articles entrusted to his care, and that the same were lost through his negligence. *Railway Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 South. 62; *Levy v. Southern Express Co.*, 4 S. C. 234; *Chicago etc. R. Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, 23 Am. St. 587, 8 L. R. A. 508; *Rosenfeld v. Peoria etc. R. Co.*, 103 Ind. 121, 2 N. E. 344. 53 Am. Rep. 500.

DUNBAR, J.—Appellant is engaged in the transfer and storage business in the city of Spokane, and the respondent stored with appellant a box of household goods and took a receipt therefor. This receipt, after exempting a very great many hazards, provides among other things, in very fine type, the following: "That we shall not be held liable for over twenty-five dollars for the loss of or damage to any box or package contents thereof, or anything above mentioned, unless the true value of each box, contents or thing is herein stated." The amount of charges was paid by the plaintiff, and when the box was called for it could not be found, and never was found. Action was brought for the value of the contents thereof, alleged to be \$500, and judgment was obtained for \$340.

The question raised by the appellant is as to the effect of the above-quoted provision in the receipt, and the defense to the action was based upon said provision, it being conceded that more than the amount of \$25 had been tendered to the plaintiff. No explanation was made or attempted by the appellant for the loss of the box and its contents. The court instructed the jury, among other things, that the one thing left for them to determine in the case was the value of the

goods, and that the limitation placed in the receipt was of no effect. This instruction, it is claimed, was erroneous. Error is also alleged in the sustaining of respondent's objection to certain testimony offered by the appellant. We do not feel called upon to enter into a discussion of the question whether or not this limitation in the receipt, placed there in such fine type that the ordinary person would never notice it, constitutes a contract between the bailor and bailee; nor whether the bailee can stipulate away his common-law responsibilities; for, under the whole record as presented, it seems to us the appeal is without merit. The testimony of Mrs. Gannon was to the effect that she had marked the box plainly in ink upon a pasteboard, which was nailed to the top of the box, as follows: "P. Gannon. Storage. This side up. Glass. Value \$500." Mr. Gannon also testified that, when he called at the storage office for the receipt which was given to him several hours after the agent of the company had taken the box from the house of the plaintiff to the storehouse of the defendant, he saw the box sitting outside of the office at Seehorn's warehouse, and that he noticed it particularly by reason of the card which was upon the box, and the card was inscribed as stated by Mrs. Gannon, viz.: "P. Gannon. Storage. This side up. Glass. Value \$500." This testimony is not disputed. All the testimony offered upon this subject by the defense was by the witness Merriam, who was engaged with the Seehorn Transfer & Storage Company as their bookkeeper and agent, looking after the general business. When asked, "Was there any label of any kind on the box?" he said, "I think there was." "Q. What was that label?" "A. I think it was 'P. Gannon.' I didn't notice it in particular." It was evidently not the intention of counsel for respondent to rely upon the testimony of this witness in that regard, for the response of the counsel to the witness was, "Well, if you did not notice it in particular, you did not know," and there the examination closes. So that, ac-

according to the testimony which the jury would not have been warranted in ignoring, the plaintiff, even under the theory of the defendant, had done his duty and complied in spirit with the provisions of the receipt. On the other hand, if a technical compliance with the language of the receipt, "Unless the true value of each box, contents or thing is herein stated," means that the value must be stated in the receipt, then it was the duty of the bailee to have incorporated the value in the receipt, for the bailor had no jurisdiction over the receipt before it was made out, signed, and delivered to him by the bailee.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and CROW, JJ., concur.

FULLERTON and ROOT, JJ., concur in the result.

[No. 6237. Decided September 26, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Security Savings Society, Appellant, v. G. L. Moss, as Treasurer of the Town of Medical Lake, Respondent.*¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT DISTRICTS. Under Laws 1888, p. 16, a municipality of less than six thousand inhabitants has no power to create a special assessment district.

SAME—SPECIAL ASSESSMENT DISTRICTS. The general incorporation act of 1888 (Laws 1888, p. 224, § 23) empowers municipalities to create special assessment districts; and a contract by a city for a local improvement, agreeing to pay for the work as fast as the city collects and receives the special assessments, does not create a liability against the city.

SAME—LIABILITY WHERE SPECIAL ASSESSMENT INSUFFICIENT. Where a municipality, organized under the void act of 1888, contracted for street improvements payable with warrants on a special assessment fund was, after the completion of the work, reorganized under the act of 1890, and thereafter ratified the indebtedness for the street improvements aforesaid and declared it to be a town debt, warrants drawn on the general fund after the exhaustion of the spe-

¹Reported in 86 Pac. 1129.

cial fund, in exchange for special assessment warrants, are without consideration and void; since the assessment district and not the city was liable therefor.

SAME—INDEBTEDNESS OF SPECIAL ASSESSMENT DISTRICT—RATIFICATION. The balance due a contractor upon the indebtedness of a special assessment district for a local improvement, after the assessment is exhausted, is not such a moral obligation of the town as can be ratified and made a legal debt of the town.

SAME—GENERAL FUND WARRANTS—CONSIDERATION. Warrants on the general fund issued in exchange for special assessment warrants after the completion of improvements are without consideration where the city was not liable for the special warrants.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered September 16, 1905, in favor of the defendant after a hearing on the merits, denying an application for a writ of mandamus to compel a city treasurer to pay warrants. Affirmed.

Wm. E. Richardson and P. C. Shine, for appellant.

Post, Avery & Higgins, for respondent.

HADLEY, J.—This action was brought to procure a writ of mandate to compel the treasurer of the town of Medical Lake to pay certain general fund warrants issued by said town. The treasurer declines to pay them, on the ground that they do not represent a valid indebtedness against the town. The judgment was against the relator, the holder of the warrants, and it has appealed.

The town of Medical Lake was incorporated under the act of 1888, which act was thereafter declared void by this court. The town reincorporated under the act of 1890, and the reincorporation became effective June 12, 1890. It has been a municipal corporation of the fourth class under the laws of this state since the last named date. On the 17th day of May, 1889, the officers of the then void corporation entered into a contract with one Peter Lund, of the following import: In consideration of the sum of \$8,645 said Lund agreed to improve Broad street in said town according to

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plans and specifications then on file. The town undertook to pay for the work upon the completion of the contract, and agreed in the contract to proceed at once to levy a special assessment upon the property fronting upon the street to be improved, for the purpose of paying the contract amount. It was also agreed that the town should collect and pay over to the contractor the amount of such assessments without delay and in the shortest time possible under its charter and ordinances. It was further agreed that, if payment should become due and if the town should not have received sufficient money from such special assessments to make the payment, it should issue to the contractor its warrants for the amount of the deficiency, payable to him or his order "out of said fund." The contract also contained the following:

"And the said town of Medical Lake further agrees that, in case such warrants are issued and accepted by said Peter Lund, it will redeem and pay them before due, if presented, as fast as and whenever it collects and receives the money from such special assessments."

The work was completed, warrants were issued, and about \$5,000 of the amount was collected and paid over. The remaining warrants were unpaid and were outstanding and unredeemed at the time of the reincorporation.

After the reincorporation and on the 18th day of November, 1890, the council of the newly incorporated town passed an ordinance designated as No. 20 and entitled "An ordinance to ratify and confirm certain indebtedness of the town of Medical Lake." Section 1 of the ordinance contained the following:

"The following indebtedness heretofore incurred by the town of Medical Lake as heretofore incorporated . . . is hereby confirmed, ratified, recognized, and declared to be indebtedness of the town of Medical Lake as now organized."

Among other warrants mentioned in the section as representing indebtedness which was ratified, a number of the warrants issued for the Broad street improvement were speci-

fied, the aggregate face amount of which was \$2,537.10. Thereafter, on the 7th day of July, 1896, the council passed an ordinance known as Ordinance No. 67, and which was entitled as follows: "An ordinance providing for the changing of certain street grade warrants for general fund warrants." After a preamble, § 1 of the ordinance is as follows:

"That the mayor and town clerk be and are hereby authorized on the presentation to them of any grade fund warrants on either LeFevre or Broad street, to cancel the same and issue in lieu thereof warrants for the same amount and bearing the same date upon the general fund of the town of Medical Lake."

In pursuance of said ordinance above mentioned, unredeemed Broad street grade fund warrants were surrendered and in lieu thereof general fund warrants bearing the same date as the original grade fund warrants were issued. Appellant seeks by this action to compel payment of the last named warrants.

Appellant contends that the contract for the improvement of Broad street created a general liability against the town, and not merely a liability against a particular district. It concedes that the contract provided for the creation of an assessment district and for a special assessment upon the property contained in the district, and that both parties to the contract proceeded upon the theory that the town had the same authority to create a special assessment district and to levy a special assessment as was conferred upon towns and villages by the act of the territorial legislature concerning special assessments, approved February 2, 1888, Laws 1888, page 16. It is pointed out, however, that the power did not exist under that act for the reason that it was limited in its operation to municipalities having a population of six thousand or more, and that the town of Medical Lake was not such a municipality. With the above-mentioned statute eliminated for the reason stated, appellant argues that the general incorporation act of 1888 also failed to attempt to con-

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fer the power to create special assessment districts. Section 23 of that act, Laws 1888, page 224, refers to the powers concerning streets, and is as follows:

"To have streets and alleys opened, graded and repaired and the footways and sidewalks paved or planked at the expense of the occupants of the adjacent lots, or if any such owner or occupant fails to open, repair or pave or plank the same as required by ordinance, such board of trustees may cause the same to be done and may recover the full expense thereof, and the costs of the proceedings to obtain such recovery from such owner or occupant by action in the name of the corporation before any court of competent jurisdiction, and if any tenant be required to open, grade, repair or plank in front of the property occupied by him, the expense thereof is a good set-off against so much rent due the owner; but no tenant can be required to expend more than the rent due, and such charges are a lien upon the property and may be enforced and collected as other liens."

The first part of the above section was clearly intended to confer the power to improve streets at the expense of adjacent property, and that power by necessary inference included the further power to arrange a scheme for assessment districts in order to carry the expressed power into effect. Appellant argues, however, that the power was not intended to be included in the statute; that that part of the Broad street contract which provided for issuing special fund warrants in payment of the contract price was unauthorized by the terms of the statute; and that the legal effect of the contract must therefore have been that the town agreed generally to pay for the work and to assume the burden of recovering the expenditure from the property owners. The inference is therefore drawn that there was a general promise to pay on the part of the town, made before its legal existence, and that such promise was ratified and became enforceable against the taxpayers after the legal incorporation. We have said we think the statute should be construed as having been intended to include the power to make special assessments. Then, in

the light of the terms of the statute and in view of the contract and what was done by the contractor and the people within the territory that afterwards became the town of Medical Lake, what did they intend and undertake to do? An ordinance was passed for the grading of Broad street. It created an assessment district for the purpose of paying the expenses, and provided for bids and for letting the contract to do the work. Bids were made in pursuance of the ordinance, the contract was let in terms as above stated, warrants were issued on a special fund for the grading of Broad street, and the property holders paid the larger part of the assessments. These facts, we think, establish beyond controversy that the intention of all parties was merely to rely upon special assessments, and that, even if the town of Medical Lake had been a valid corporation at that time, there would have been no general liability against the town which would have compelled the issuance of general fund warrants under the decisions of this court. *German American Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259; *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524; *Rhode Island Mtg. etc. Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197.

Appellant insists that, notwithstanding the above decisions, this case must fall within the decision of *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306. If there exists any conflict in principle between that decision and those above cited, it should be said that the cases first cited are the later decisions of this court. There is, however, an important distinction between the case at bar and *Abernethy v. Medical Lake*. In that case a street contract had been let by the void corporation, and the work had not been completed when the valid corporation came into existence. It was proposed to the bondsmen of the contractor who held the incomplete contract, that if they would finish the work the town would "ratify the indebtedness incurred upon said street." A con-

tract of that kind was entered into between the bondsmen and the valid corporation, and the work was completed. An ordinance was then passed declaring a certain sum to be the indebtedness of the town, but the warrants issued were limited to "LeFevre street grade fund." There was no such fund, and the treasurer refused payment for want of funds. The consideration for the new contract and for doing the incompleated work was that the town should undertake to pay. There was then a corporation capable of contracting, and it received something of value from the contractors which it did not before possess, viz., a completed and improved street which was before incomplete and unprepared for public travel. It was held that the town was liable and should pay from its general fund. In the case at bar, however, the street work was completed before the valid corporation came into existence. No new contract was made, no work was done, and the corporation received nothing that did not exist when it was created. *Abernethy v. Medical Lake* does not appear to have been decided on the theory which is urged in the case at bar, viz., that a promise existed before the legal existence of the town, but upon the ground that the town made a contract after its creation and, having received something of value therefrom, it by ordinance declared the debt to be its own. We therefore think that case must be distinguished from this one.

Appellant concedes that the contract under which the street work was done was invalid for the reason that the municipal corporation, which was a party to it, was illegally organized and could not make a contract, but it is argued that the corporation could ratify the contract after it was legally created, provided there was sufficient consideration for such ratification. *State ex rel. Traders Nat. Bank v. Winter*, 15 Wash. 407, 46 Pac. 644, is cited as authority for this contention. The indebtedness involved in that case was of a general nature, incurred by the void corporation of the town of Colville.

After it became legally incorporated, the town by ordinance ratified the indebtedness and assumed its payment. This court held that, in view of the moral obligation and of two legislative acts found respectively in Laws of 1891, page 279, and Laws of 1893, page 183, the validation was effective. We have said that the indebtedness ratified was of a general character such as is enforceable by general taxation against valid municipalities, and the statutes mentioned relate to the validation of such general obligations. It was not held that a special indebtedness for street improvements incurred by a void municipality and which could not have been a liability against general taxpayers even if the municipality had had a legal existence could, after the legal creation of the corporation, be so ratified by the corporation as to convert the liability from that of a special indebtedness to a general one enforceable against all the taxpayers. Such a view we think is not maintainable by sound reasoning, and it has not been so held by this court. Avoiding the force of this, appellant, as we have seen, contends that the obligation was originally a general one of moral force against all the taxpayers, and that ordinance No. 20 of the valid municipality above mentioned was an effective ratification. Within our view as above expressed, it was, however, never intended that the indebtedness should be paid by the general taxpayers, and they were never parties to any moral agreement to pay it. We think it is manifest that it was intended, both by the contractor and the acting trustees for the taxpayers, that the abutting property owners alone should pay this indebtedness. Ordinance No. 67 merely authorized an exchange of the grade fund warrants for others on the general fund. There was no consideration for the general fund warrants except the indebtedness represented by the grade warrants, and since the latter could not be made a charge against the general taxpayer, it follows that payment of the warrants in question cannot be so enforced.

Other questions involving the constitutional limit of in-

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debtedness and *res adjudicata* are argued, but inasmuch as the court made no findings upon those subjects, and as they are not necessary to a determination of the case, we shall not discuss them.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 6210. Decided September 27, 1906.]

WENZEL STRUNZ *et al.*, Appellants, v. FRANK HOOD *et al.*,
Respondents, JAMES SULLIVAN, Appellant.¹

BOUNDARIES—ESTABLISHING LOST CORNERS—APPOINTMENT OF COMMISSIONER—REPORT—EXCEPTIONS—EVIDENCE CONTRADICTING REPORT—EXCLUSION. In a proceeding to reestablish a lost corner by a survey, it is not error, upon receiving the report of the commissioner appointed to make the survey, to refuse to admit additional evidence as to whether the monuments were lost, and contradicting the report in that particular, where that issue had been previously determined before the appointment of the commissioner.

SAME—METHOD OF REESTABLISHMENT—FOLLOWING CONCEDED MONUMENTS AND FIELD NOTES. In a proceeding to reestablish a lost corner by a survey, if the actual location of the monuments can be ascertained, it is the duty of the surveyor to relocate the lost corner by following the government field notes, proceeding from conceded monuments and corners.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY. A new trial for newly discovered evidence as to the location of a lost corner is properly denied where such evidence is vague and indefinite.

JUDGMENT—DEFAULT—VACATION—SUFFICIENCY OF SHOWING. A motion to vacate a default judgment entered in a proceeding to establish a lost corner is properly denied where, upon the showing made, it appears that the corner was lost and defendant's evidence as to its location was too indefinite to warrant findings in support of his contention.

JUDGMENT—DEFAULT—RIGHT TO VACATION. Under Bal. Code, §§ 4878, 4879, a nonresident defendant is not entitled to have a default set aside, and to defend as a matter of right at any time before judgment, except upon sufficient cause shown.

¹Reported in 87 Pac. 45.

SAME—BOUNDARIES—ACTION TO ESTABLISH. An action to have a lost corner established by survey is not an action for the recovery of real property, within the meaning of Bal. Code, § 5518, allowing a nonresident defendant to appear after default and defend at any time before judgment.

COSTS—BOUNDARIES—ACTION TO ESTABLISH. In an action to re-establish a lost corner it is error to tax the costs to the successful party, but the same should be equitably apportioned by an equal division between the parties

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 22, 1905, upon confirming the commissioner's report, establishing a lost boundary. Modified.

P. C. Shine, for appellant Sullivan.

R. J. Danson, for appellants Strunz, contended, *inter alia*, that the power of the court or commissioner extended only to locating and establishing lost or doubtful boundaries, and they can in no event disturb title or establish new lines. 5 Cyc. 946; *Martz v. Williams*, 67 Ill. 306; *Allmon v. Stevens*, 68 Ill. 89; *Irvin v. Rotramel*, 68 Ill. 11; *Walker v. Boyer*, 121 Ga. 300, 48 S. E. 916; *Amos v. Parker*, 88 Ga. 754, 16 S. E. 200; *Crawford v. Wheeler*, 111 Ga. 870, 36 S. E. 954; *Squire v. Greer*, 2 Wash. 209, 26 Pac. 222; *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916; *Thayer v. Spokane County*, 36 Wash. 63, 78 Pac. 200; *Randall v. Burk Township*, 4 S. D. 337, 57 N. W. 4; *Broll v. Wishert* (Tex. Civ. App.), 79 S. W. 1089; *Hess v. Meyer*, 73 Mich. 259, 41 N. W. 422; *Trinwith v. Smith*, 42 Ore. 239, 70 Pac. 816; *Vandusen v. Shively*, 22 Ore. 64, 29 Pac. 76; *Greer v. Squire*, 9 Wash. 359, 37 Pac. 545; *Arneson v. Spawn*, 2 S. D. 269, 49 N. W. 1066; *Whitcomb v. Dutton*, 89 Me. 212, 36 Atl. 67; *Robinson v. Laurer*, 27 Ore. 315, 40 Pac. 1012. The question is not where the line ought to have been located, but where it was in fact located. *Squire v. Greer*, 2 Wash. 209, 26 Pac. 222; *Doolittle v. Bailey*, 85 Iowa 398, 52 N. W. 337; *Trinwith v. Smith*, 42 Ore. 239, 70 Pac. 816; *Climer v. Wallace*,

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28 Mo. 556, 75 Am. Dec. 135; *Newton v. Templeman*, 115 Iowa 643, 89 N. W. 24. If the monuments are destroyed and their location cannot be identified, the next best evidence is the field notes. *Stangair v. Roads*, 41 Wash. 583, 84 Pac. 405; *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916; *Robinson v. Laurer*, 27 Ore. 315, 40 Pac. 1012. If the government stakes or monuments can be found, or the place where they originally were placed can be identified, they control in all cases. *Arneson v. Spawn*, 2 S. D. 269, 49 S. W. 1066, 39 Am. St. 369; *Hess v. Meyer*, 73 Mich. 259, 41 N. W. 422; *Randall v. Burk Township*, 4 S. D. 337, 57 N. W. 4; *Stangair v. Roads*, 41 Wash. 583, 84 Pac. 405.

Munter & Jesseph, for respondents.

CROW, J.—This action was instituted by the plaintiffs Wenzel Strunz and Mary Strunz, his wife, under Bal. Code, §§ 5667, 5669 (P. C. §§ 3285, 3287), to reestablish certain lost corners and a lost boundary line between two sections of land in Spokane county. The plaintiffs alleged that said line between sections 2 and 3 of township 26, north of range 45 E, W. M., had been lost and was uncertain; that plaintiffs are the owners of certain subdivisions constituting the fractional southwest quarter of section 2; that the defendant Joseph Sullivan is the owner of the northwest quarter of said section 2; that the defendants Hood and wife are the owners of lots 1, 4, 5 and 6, of section 3, being the only portion of said section which can be affected by said boundary line. The defendants Rebecca E. McCall, Joseph L. Rose, Nancy J. Rose, and the Pennsylvania Mortgage and Investment Company, who were alleged to be the owners of the east half of section 2, made default. The defendant James Sullivan was served by publication and defaulted for nonappearance. The defendants Hood and wife denied that said dividing line was lost or uncertain.

On October 4, 1904, a trial was had to determine whether said line had become lost and uncertain. Both parties con-

ceded that the government corner post at the northeast corner of section 3 and the northwest corner of section 2 was in existence and could be accurately located. The evidence disclosed that a portion of the southwest quarter of section 2, and the south and west line of that part of section 3 here involved were bounded by Lake Newman, a meander line having been run along said lake at said points by the United States government surveyors. It further appeared that when the original government survey was made, a meander corner post had been established on the shore of said lake at the point where the line between sections 2 and 3 intersected said meander line, but that this monument had been lost. At the trial the plaintiffs produced numerous witnesses to show that this monument could not be found or located, while the defendants Hood and wife attempted to show that said corner had been located at the south end of a dividing line run in 1903 by one Stolzenberg, a surveyor employed jointly by plaintiffs and said defendants Hood and wife.

The trial court made findings of fact, from which it appears that said adjoining sections 2 and 3 both abut upon that body of water known as Newman Lake, which so cuts them as to cause the north and south dividing line between them to be less than one mile in length: that said sections were included in a survey made by the United States government in August, 1880; that in said survey a corner post was established at the northwest corner of section 2, being the northeast corner of section 3, and that the field notes of said survey also show that a quarter post was established on said line, forty chains south of said initial corner; that said field notes further show that a meander post was also fixed and established where said dividing line ran into said Newman Lake, and that said dividing line between said sections 2 and 3 connected said three posts and was and is the dividing line between said two sections; that said quarter post and said meander corner post had both been lost and

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obliterated, and that their location cannot be ascertained; that the plaintiffs and said defendants Hood and wife cannot agree upon the location of said lost quarter post and meander corner post, and that one competent surveyor would be ample as a commissioner to establish said boundary. Upon said findings the court entered a preliminary order appointing Joseph M. Snow, a competent and practical surveyor, as a commissioner to survey, erect, establish, and properly mark the quarter corner post, and the meander corner post, on the dividing line between said sections.

On April 14, 1905, the commissioner made a written report, from which it appears that he did not succeed in finding the original government quarter post or the original government meander post; that he did find the original government post at the northwest corner of section 2, and the northeast corner of section 3; that from this point he ran a random line in a southerly direction to the shore of Newman Lake; that having done so, he made a careful search along this random line for a distance of two hundred feet on each side, but that said search failed to show any trace or mark to indicate that the section line had ever been run or marked on the ground; that afterwards he ascertained the true course of the random line by a solar observation, and then established a true line running due south from said corner of sections 2 and 3, on the north boundary of the township; that at a point 2,640 feet south of said section corner, he established a quarter section corner between sections 2 and 3, and marked the same by setting a granite stone; that at a point 4,880 feet south of said corner of sections 2 and 3 and at a point twenty feet north of high water mark on the shore of Newman Lake, he established the meander corner and marked the same by setting a granite stone. The plaintiffs filed written exceptions to this report. On July 7, 1905, the defendant Sullivan moved the court to vacate the default entered against him, supporting his motion

by affidavits which appear in the record. Afterwards the report of the commissioner, the exceptions of the plaintiffs thereto, and the motion of the defendant Sullivan to vacate the default came on for hearing, at which time the trial court confirmed and approved the report of the commissioner and denied the motion to vacate said default. The plaintiffs' motion for a new trial having been overruled, judgment was entered establishing the boundary line, the quarter section corner and the meander corner, as shown and fixed by said commissioner's report. The plaintiffs Strunz and wife have appealed from said final judgment, and the defendant Sullivan has also appealed from said final judgment and from the order denying his motion to vacate said default.

The appellants Strunz and wife make numerous assignments of error involving the following contentions: (1) Error of the trial court in refusing to admit additional evidence after the commissioner's report had been made; (2) error in overruling appellants' exceptions to said report; (3) error in denying appellants' motion for a new trial; (4) error in taxing all costs against the appellants; and (5) error in establishing the boundary line as marked by said commissioner.

At the preliminary hearing, the appellants Strunz and wife earnestly endeavored to show that no monuments locating the quarter section corner or the meander corner could be found; also that the lines previously run by various surveyors, one of whom had been jointly employed by themselves and the respondents Hood, were incorrect. After the report of the commissioner had been filed, and the appellants Strunz and wife had interposed their exceptions, they asked permission to introduce further evidence for the purpose of showing that their exceptions were well taken, and that the locations of said original government quarter post and said original government meander corner post could be respectively found, ascertained and established at points about 170

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feet and 356.65 feet west of the points reported by Commissioner Snow, and they now contend that the trial court erred in refusing said offer. The evidence which appellants then tendered was afterwards specifically detailed in the affidavits presented in support of their motion for a new trial. The issue as to whether the monuments and boundaries were lost had been previously tried, and there is nothing in the report of the commissioner inconsistent with the findings then made. Under some circumstances it might be proper to admit additional evidence, when the report of the commissioner and the exceptions thereto come on for hearing, but we fail to see any reason for doing so in this case, and conclude that the trial court did not err in refusing the offer made by the appellants. The report of the commissioner explicitly detailed the methods adopted by him for discovering the true location of the government monuments and for reestablishing the lost quarter section corner and meander corner. Were we to consider the additional evidence offered by the appellants as disclosed by the affidavits presented in support of their motion for a new trial, our conclusion would nevertheless be that the meander corner and the quarter section corner were both lost, and could only be established in the manner adopted by the commissioner.

Appellants correctly contend that a court or a court commissioner cannot correct the United States government surveys, or establish government corners at points other than those fixed by the government surveyors; that in any attempt to reestablish an original survey the purpose should be to follow the footsteps of the government surveyor as nearly as possible, and that when there is any variance between field notes and monuments as set up by the United States government surveyors, the monuments must prevail. It was undoubtedly the duty of the commissioner to ascertain if possible where the original government monuments had been actually located and established, rather than where he might

think they ought to be located or established. The commissioner's report, however, shows that, after a most diligent search he was unable to find the original quarter corner or meander corner posts or any traces thereof, and the evidence of appellants' and respondents' witnesses, including several competent surveyors, shows that they were likewise unable to find the same. This being true, it became the duty of the commissioner to reestablish the lost line and relocate the lost quarter corner and lost meander corner. He did this by proceeding from conceded monuments and corners fixed by the government surveyors, and by following the government field notes, and the trial court acted properly in approving his action and report.

We also conclude that no error was committed in denying the motion for a new trial. The appellants contend that they are entitled to a new trial on account of newly discovered evidence, which they now claim will show that the original meander corner can be found and located at a point some 356.65 feet west of the meander corner established by the commissioner. They do not claim, however, that any monument or any traces thereof still remain at the point mentioned. We have examined appellants' newly discovered evidence as disclosed in their affidavits, and conclude that it is too vague, indefinite and uncertain to fix the meander corner in accordance with their present contention, at a point 356.65 feet west of the true north and south line established by the commissioner. Evidence to sustain such a contention should be most clear and convincing.

The appellant Sullivan contends that the trial court erred in denying his motion to vacate the default entered against him. He concedes that he was absent from the state at the time the summons was published. The default was entered on July 25, 1904. The affidavits presented in support of his motion show that he returned to the state some time in the following November, and then knew of the pendency of

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this action, and that he also knew Commissioner Snow was making his survey. He filed no motion to set aside the default until July 7, 1905, at which time he did not tender any answer, but in his own affidavit supporting his motion, alleged that he had stated all the facts with reference to said proceeding and said boundary line to his attorney, and was advised by him that he had a good and meritorious defense. His affidavit shows his only contention to be that the original government meander corner post was located some 356.65 feet west of the point fixed by the report of Commissioner Snow. He does not attempt to show that any monument still remains or can be found at that point. On the contrary a clear inference arises from his affidavits that it does not now exist. It will thus be seen that he is now proposing to ascertain and fix a corner and a lost monument by vague and uncertain evidence not sufficient to sustain findings which he would necessarily ask. Were we to concede everything for which he contends in his affidavits and his application to set aside the default, we would still conclude that his showing is insufficient. His application was made before entry of final judgment, and he contends that, under Bal. Code, § 4880 (P. C. § 338), it should have been granted as a matter of right. This section provides that where a defendant has not been served personally in the cases provided in Bal. Code, §§ 4878 and 4879 (P. C. §§ 336, 337), he shall on application *and sufficient cause shown* at any time before judgment, be allowed to defend. The legislature in enacting these sections, intended that a defendant should not be allowed to defend except upon sufficient cause shown. We do not think any such showing has been made by the appellant Sullivan.

The appellant Sullivan also claims that he is entitled to have the default vacated by reason of the provisions of Bal. Code, § 5518 (P. C. § 1154). That section, however, refers only to an action for the recovery of the possession of real property. This is not such an action. This action was

commenced by the appellants Strunz and wife to reestablish a lost boundary line, and not to recover possession of real property. No error was committed by the trial court in refusing to vacate said default.

Appellants Strunz and wife further contend that the trial court erred in taxing against them the entire costs of this proceeding. In *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916, we held that an equitable apportionment of costs in a case of this character would be an equal division of the same between the parties, and that rule should prevail here.

It is ordered that the judgment of the superior court be modified to the extent of taxing the costs equally between the appellants Strunz and wife and the respondents Hood and wife, and as so modified said judgment will be affirmed. The respondents Hood and wife will recover their costs on this appeal.

MOUNT, C. J., ROOT, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

[No. 6301. Decided September 27, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Henry J. Biddle et al., Plaintiff, v. THE SUPERIOR COURT FOR CLARKE COUNTY, Respondent.*¹

EMINENT DOMAIN—CORPORATIONS—STATUTORY REQUISITE OF SUBSCRIPTIONS TO STOCK—EVIDENCE—STOCK BOOKS The properly identified stock books of a railway corporation, showing the names of the subscribers of all the capital stock, is presumptive evidence that all the stock was subscribed, as required by Bal. Code. § 4250, to entitle the railway to condemn land for right of way.

SAME—SUBSCRIPTION BY TRUSTEE. A subscription to the capital stock of a corporation by one subscribing as trustee, shows a liability to pay therefor and is a sufficient subscription, in the absence of want of good faith or insolvency, to entitle a railway to condemn land for a right of way.

¹Reported in 37 Pac 40

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RAILROADS—LOCATION OF LINE—CORPORATIONS—EXTRA-TERRITORIAL ACTS—ADOPTION. Where a domestic railway corporation adopted its line of location at a meeting of the directors held in another state, the subsequent bringing of condemnation proceedings in this state for a right of way along the same line amounts to an adoption of the corporate action taken outside of the state.

EMINENT DOMAIN — DAMAGES — ASSESSMENT — ENTIRE TRACTS. Where, in a condemnation proceeding, the defendants expressly raise the point that the tract across which condemnation is sought is only part of an entire farm used as one tract, they are entitled to have the entire tract considered as a basis for estimating their damages.

Certiorari to review a judgment of the superior court for Clarke county, McCredie, J., entered June 15, 1906, after a hearing on the merits, adjudging a public use etc., and directing the assessment of damages for a railroad right of way. Modified.

Donald McMaster, Teal & Minor, and J. W. Robinson, for relators.

James B. Kerr and Geo. T. Reid, for respondent.

HADLEY, J.—An order to show cause why a writ of review shall not issue to review the proceedings of the superior court of Clarke county in certain railway condemnation proceedings was made by this court July 11, 1906. The petitioner for the condemnation is the Portland & Seattle Railway Company, a corporation organized under the laws of this state. The petitioner seeks to condemn a strip of land one hundred feet in width across the lands of Henry J. Biddle and wife for right of way purposes. Certain lands are described in the petition as comprising the entire tract of the defendants through which the railway line has been located. The defendants' answer admits the ownership of the land described in the petition, but alleges that they are the owners of a larger tract which is described as including what is mentioned in the petition, and that the whole of the larger tract described in the answer is owned and occupied by them as an entire tract as their farm and home. They allege that in

order that their compensation may be fully ascertained, it is necessary to determine the damage to the entire tract owned by them considered as a whole. The answer also puts in issue the averments of the petition with reference to the legal capacity of the petitioner to condemn. A hearing was had, testimony was submitted upon the question of public use and necessity, and the court found that the contemplated use for which the land is sought to be appropriated is a public use, and that the public interests require its appropriation. An order was entered condemning a strip of land one hundred feet in width, the same being fifty feet in width on either side of the center line of the petitioner's location as staked out over and across the land described in the petition. It was also ordered that the damages should be ascertained by a jury, in July, 1906. Before any hearing was had upon the subject of damages, the order to show cause herein was issued, and further proceedings were stayed. The record was certified to this court, together with a bill of exceptions. A hearing was had thereon, and this court finds that the record presents a proper case for the writ of review.

The defendants first contend that the petitioner did not show that it is authorized to prosecute a condemnation proceeding. The proof showed the regular incorporation of the petitioner as a railway company. It is contended, however, that the evidence did not show compliance with the following provision in Bal. Code, § 4250: "Provided, that no such corporation shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed." The books of the corporation, properly identified, were introduced to show that the entire capital stock had been subscribed. The evidence offered we think was competent for that purpose. It is generally held that when one's name appears upon the books of a corporation as a subscriber for stock it is presumptive evidence that he is such, in the absence of other evidence to rebut the presumption.

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"The records of a corporation are competent and sufficient evidence to prove subscriptions to its capital stock and to show whether or not the number of shares required by its charter have been subscribed, where no proof is introduced to destroy their effect. If it is shown that a person's name appears on the subscription or stock book of a corporation as a subscriber or stockholder, or upon the books of commissioners appointed to receive subscriptions, this is *prima facie* proof that he is a subscriber or stockholder." 2 Clark & Marshall, Private Corporations, § 454.

In *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437, the court said:

"Taken as a whole it is clear that the evidence offered was amply sufficient to warrant the jury in finding that the defendant was a stockholder as alleged. Where the name of an individual appears on the stock book of a corporation as a stockholder the *prima facie* presumption is that he is the owner of the stock in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant."

The above-stated rule is also supported by the following authorities: *Glenn v. M'Allister's Executors*, 46 Fed. 883; *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538; *Liggett v. Glenn*, 51 Fed. 381; *Marlborough Branch R. Co. v. Arnold*, 9 Gray 159, 69 Am. Dec. 279; *Rockville etc. Turnpike Road v. Van Ness*, Fed. Cas. No. 11,986: 1 Cook, Corporations (5th ed), § 55 and cases cited.

It is further contended that the records of the corporation admitted in evidence did not sufficiently show a subscription for all the capital stock. The articles of incorporation show the capital stock to be \$5,000,000, divided into fifty thousand shares of \$100 each. The subscription for the stock, as shown by the records, is as follows:

"We, the undersigned, hereby severally subscribe for the number of shares of the capital stock of the Portland and Seattle Railway Company set opposite our respective names

and signatures, and agree to pay to the Portland and Seattle Railway Company one hundred dollars upon each share so subscribed.

Name of Subscriber.	No. of Shares.	Amount.
C. M. Levey, Trustee.....	49,995	\$4,999,500.00
J. C. Flanders.....	1	100.00
C. F. Adams	1	100.00
S. B. Linthicum	1	100.00
John S. Baker	1	100.00
James D. Hoge.....	1	100.00"

It will be observed that the subscription for the entire capital stock except \$500 was made by C. M. Levey, trustee. It is contended that the subscription by Mr. Levey as trustee is not binding upon him personally, and is not a compliance with the requirements of the statute. The case of *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, is cited. That case was, however, decided upon the theory that it was not shown that a condition precedent necessary to bind the subscriber had been performed. That condition was that a given amount of stock should be subscribed before liability attached. The same was true in *Oldtown etc. R. Co. v. Veazie*, 39 Me. 571, also cited. *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257, is cited. It was held in that case that, in order to show the absence of a full subscription, testimony on the part of a subscriber was admissible which tended to show that the subscriptions were not made in good faith. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236, is also cited. That case was decided upon the theory that certain statutory regulations must be observed before collection may be enforced against the subscriber. The statute required that notice of assessments should be given, and if any subscriber or stockholder, neglected to pay for the space of thirty days after notice, the shares should be sold at public auction to the highest bidder, and the delinquent subscriber was accountable to the corporation for the deficiency. The last case cited by the defendants upon this subject is *Phillips v. Covington etc. Bridge Co.*, 2 Met. (Ky.) 219. It was held

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in that case that, in determining whether the full amount of capital stock had been subscribed, the unpaid subscriptions of persons who were insolvent, or infants, or married women, at the time of making them, should be excluded from the computation.

The above decisions do not reach the point presented in the case at bar. The evidence shows subscriptions for the full amount of the capital stock, and there is neither evidence of want of good faith nor that any of the subscriptions were made by or in behalf of persons who were insolvent or under disability. Does the stock subscription show a liability to pay for all the stock? We think it does. In *Cole v. Satsop R. Co.*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858, it was held that, when the subscription to the stock is made by one as trustee, an action to recover may be maintained against the real parties in interest when the subscription is made by the trustee as agent for others. It is also the rule that, when an agent contracts for or on behalf of an irresponsible principal who does not possess the attributes of a legal entity, or when he signs a contract professing to be signing as agent when he has no principal existing at the time, the agent is himself liable on the contract. 1 Am. & Eng. Ency. Law (2d ed.), 1122. In *Johnston v. Allis*, 71 Conn. 207, 41 Atl. 816, it was held that, where one had subscribed for stock as trustee and it transpired that the undisclosed principal was not bound, the subscriber himself was personally bound. To the same effect are the following cases: *State ex rel. Page v. Smith*, 48 Vt. 266; *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 South. 149. It follows that Mr. Levey's undisclosed principals must be liable on this subscription, or that he himself must be liable. As bearing upon the question of responsibility and good faith, the evidence shows that about \$2,000,000 has already been expended by this corporation in construction work. Since the aggregate liability outside of Mr. Levey's subscription is but \$500,

it is therefore manifest that either the undisclosed principals or the trustee must have already paid large sums on the subscription.

It is argued that sufficient adoption of the line of location has not been shown to enable the petitioner to condemn. The petitioner is a Washington corporation, and the proof showed that the line of location was first adopted by a meeting of the board of trustees held in the city of Portland, Oregon. It is contended that the corporation could not thus act without the boundaries of the state of Washington, and many authorities are cited to sustain the argument. Whatever might be said upon the merits of this question in some cases, yet the evidence in the case at bar shows that the line of location as adopted at the Portland meeting includes the route now sought to be condemned, and the bringing of this condemnation proceeding by the corporation itself within this state is such an act of the corporation as amounts to an adoption, and we think eliminates any question of extra-territorial acts in that regard.

It is also urged that the line of location of the railway across the defendants' land is not shown with sufficient definiteness. We think the testimony of the chief engineer and the maps and charts in evidence show the location with sufficient certainty. It is also insisted that the testimony does not show the necessity for appropriating a strip one hundred feet in width, and that not to exceed sixty feet in width is required. We think it reasonably appears that one hundred feet is necessary, and that the court did not err in ordering the condemnation of that amount.

It is next insisted that the court erred in its description of the land, in its order adjudicating the necessity for appropriation and calling a jury. It will be remembered from the statement of the case that the order describes the land. damages to which are to be ascertained, as the same tract which is described in the petition for condemnation. The

answer, however, avers that other land not described in the petition is a part of the same tract, and that all of the land is occupied and used by the defendants as an entirety for their home. The testimony shows that the defendants own all the land described in their answer, and that it constitutes their farm. A public highway crosses the farm, running in an easterly and westerly direction. The residence and a part of the farm buildings are situate on the south side of the highway, but a barn is located on the north side. The railway company in its petition described only the land on the north side of the road, and the order of condemnation describes the same. We think it manifest that the defendants use and occupy all the land as a whole as one undivided farm. The uses to which they put all this land situate in one body except that it is crossed by the highway, comprise all the combined arrangements for carrying on the business of a single farm. Inasmuch as the defendants expressly raised this question by their answer, and described the whole tract as the damaged one, we think they are entitled under the evidence to have the entire tract described in the answer considered as one, as a basis for estimating their damages, within what was said by this court in *Northern Pac. etc. R. Co. v. Coleman*, 3 Wash. 228, 28 Pac. 514. At the hearing the court was asked to describe the entire tract in the order of condemnation as the land to be considered in the ascertainment of damages. Thereupon the court remarked as follows: "Without passing on that now particularly, I would say that if it is one contiguous tract it will have to be included. I presume it is one tract of land." The order entered, however, described the smaller area only. The court seems to have inclined to the view that the larger area is the tract to be considered, but must have been of the further opinion that the matter presented involved a mere rule of evidence to be determined upon the trial for the ascertainment of damages. Otherwise it would seem that the court

would have passed upon the question, as it was squarely presented by the pleadings and evidence upon the hearing for the condemnation. While it does involve a rule of evidence, yet the order of condemnation as made would at least afford the basis for the contention that the inquiry as to damages must be confined to the smaller area. We therefore think the court should have passed upon the point directly and should have made its order accordingly. In this particular the order should be modified, but in all other respects it is affirmed, and the defendants are entitled to recover their costs upon this review.

The cause is remanded with instructions to proceed in accordance with this opinion, and to ascertain the damages.

MOUNT, C. J., DUNBAR, ROOT, and CROW, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 6132. Decided September 28, 1906.]

WILLIAM HENNIG, *Respondent*, v. CLAUSSEN BREWING
ASSOCIATION, *Appellant*.¹

REPLEVIN—WHEN LIES—CONDITIONAL BILL OF SALE—BREACH. Where, upon the breach of a conditional bill of sale of a stock of goods and fixtures, the vendor takes possession of additional stock purchased since the bill of sale, replevin lies to recover such additional stock.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 15, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

Brown, Leehey & Kane, for appellant.

Hathaway & Alston, for respondent.

¹Reported in 86 Pac. 1134.

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Opinion Per Curiam.

PER CURIAM.—This action was brought by the plaintiff William Hennig against the defendant Claussen Brewing Association, a corporation, to recover possession of a certain stock of wines, liquors and cigars. Plaintiff alleged ownership and right of possession in himself, and that the defendant had wrongfully seized and withheld said property. The defendant denied ownership in the plaintiff, admitted taking possession, and alleged ownership and right of possession in itself. The defendant also pleaded a conditional bill of sale made by it to one Ben Johnson, for said property, and alleged that it afterwards took possession on the default of said Johnson. Trial being had without a jury, the court made findings of fact, from which it appears that, on and before November 27, 1903, the defendant was the absolute owner of the bar fixtures, furniture, wines, liquors and cigars then located in the "Scandia Bar" in Snohomish, Washington, that on said date it made a conditional bill of sale for all of said goods, wares and merchandise, including the bar, back-bar, safe, cash register and all other furniture, together with the wines, liquors and cigars then located in said saloon, to one Ben Johnson, which conditional bill of sale was duly recorded in the office of the auditor of Snohomish county; that prior to February 9, 1905, said Ben Johnson broke the conditions of said conditional bill of sale; that on said February 9, 1905, the plaintiff William Hennig was in possession of all of said bar fixtures and furnishings of every description in said "Scandia Bar," and was the absolute owner and in rightful possession of certain wines, liquors and cigars then located in said saloon, of the total value of \$218.15; that all of the wines, liquors and cigars in said "Scandia Bar" at the date of said conditional bill of sale were of the value of \$50, and no more; that long prior to the — day of January, 1905, said Ben Johnson sold all of said stock of wines, liquors and cigars mentioned in said conditional bill of sale; that said Ben Johnson from time to time purchased additional

wines, liquors and cigars, and placed them in said "Scandia Bar;" that in January, 1905, for a valuable consideration, he sold all of the said wines, liquors and cigars then located in said "Scandia Bar" to the plaintiff; that no part of the wines, liquors and cigars sold by said Ben Johnson to the plaintiff as aforesaid was covered by said conditional bill of sale; that on February 9, 1905, the defendant was the owner of and entitled to the possession of all of the bar fixtures and furnishings in said saloon; that on said date the defendant entered said saloon and wrongfully took said wines, liquors and cigars from the possession of the plaintiff; that, at the time, the defendant paid plaintiff the sum of \$25.65, the amount paid by plaintiff for a government retail liquor license, but that no part of said sum was paid to plaintiff as a consideration for the wines, liquors and cigars then located in said saloon; that prior to the commencement of this action, plaintiff demanded possession of said wines, liquors and cigars; that the defendant wrongfully withholds the same, and that they are worth the sum of \$218.15. Upon these findings, judgment was entered in favor of the plaintiff for the recovery of the possession of the identical wines, liquors and cigars owned by him, and in case the delivery thereof cannot be had, that he recover from the defendant the sum of \$218.15, their value, with costs. From said judgment this appeal has been taken.

The controlling assignments of error presented are that the trial court erred in making said findings of fact, and in refusing other findings requested by appellant. The evidence shows that, at the time the appellant made its conditional bill of sale to said Ben Johnson in November, 1903, there was a small stock of liquors, wines and cigars in the said "Scandia Bar;" that all of said stock was afterwards sold by said Johnson in the regular course of trade; that thereafter he purchased other and additional stock; that in January, 1905, he sold said saloon business, including the stock of wines,

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liquors and cigars then in his possession, to respondent Hennig, and that at said time there was no stock of wines, liquors or cigars in said saloon covered by appellant's conditional bill of sale.

The only issue now before us is one of fact. We have carefully examined all of the evidence and find that it sustains each and all of the findings made by the trial court. This being true, the final judgment was properly entered, and is affirmed.

[No. 6155. Decided September 28, 1906.]

*In the Matter of the Estate of HENRY P. SINCLAIRE,
Deceased.*

CHARLES WATSON, *Appellant*, v. HENRY P. SINCLAIRE,
JUNIOR, *et al.*, *Respondents*.¹

APPEAL—FINAL ORDERS—VACATION OF EX PARTE ORDER. Upon an application to reappoint a trustee, who alleged that he had been induced to resign through fraud, the vacation of an *ex parte* order of reappointment, which could only be made on notice, is not appealable as a final order, since it does not dispose of the application.

Motion to dismiss an appeal from an order of the superior court for King county, Frater, J., entered September 13, 1905, after a hearing upon affidavits, vacating an order appointing a trustee. Granted.

E. H. Guie, J. J. McCafferty, and W. A. Keene, for appellant.

Peters & Powell, for respondents.

MOUNT, C. J.—This appeal is taken from an order vacating an order appointing the appellant trustee of certain real estate in King county. It appears that Henry P. Sinclair died in New York state, leaving a will by which the deceased devised certain real property in Seattle to Henry P. Sinclair,

¹Reported in 86 Pac. 1117.

Junior, William Sinclair and Charles Watson, in trust for a stated purpose. The will was probated in New York and subsequently in this state. Thereafter the trustees accepted the trust and entered upon their duties. Thereupon the said Charles Watson resigned his trust and subsequently filed a petition in the superior court of King county, alleging, among other things, that he had been induced by fraud to resign his trust, and prayed to be reappointed as a trustee of the estate. This petition was not served upon any person. The court made an order appointing the said Charles Watson trustee, as prayed. Thereafter the other trustees appeared and moved the court to vacate the order appointing said Watson trustee, "upon the ground that said prior order was made without any summons, process or notice of any kind upon these moving parties or either of them, or upon any person or persons interested in the estate of Henry P. Sinclair, deceased, and that this court has no jurisdiction to make said order." Upon a hearing based upon affidavits, the court granted the motion and vacated the order of appointment.

Respondents move to dismiss the appeal, for the reason that the order appealed from is not a final order and therefore not appealable. This motion must be sustained. The order appealed from did not dismiss the appellant's application and thereby finally dispose of the same. It simply set aside an order made *ex parte* and without notice, in a case where notice should have been given because of allegations of fraud. It left the application still pending and the truth of the allegations thereof undetermined. The effect was the same as where a judgment is vacated. We have held such orders not final and not appealable. *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78; *Metler v. Metler*, 28 Wash. 734, 69 Pac. 9; *State ex rel. Harris v. Superior Court*, 34 Wash. 248, 75 Pac. 809.

The appeal is therefore dismissed.

ROOT, CROW, DUNBAR, HADLEY, and RUDKIN, JJ., concur.

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Opinion Per Root, J.

[No. 6211. Decided September 28, 1906.]

MAIN INVESTMENT COMPANY, *Respondent*, v. OLAUS OLSEN,
Appellant.¹

APPEAL—TIME FOR FILING BOND—MISTAKE OF CLERK—SUPPLEMENTAL RECORD—DISMISSAL. An appeal will not be dismissed because it appears that the bond was filed after the time allowed by law, where it is shown by a supplemental record that the lower court has found that it was left with the clerk for filing within the time, but by inadvertence it was not marked filed until the time for filing had expired.

CONTRACTS—BREACH OF UNIFORM CONTRACT—ARBITRATION. Under the terms of a "uniform" building contract providing for arbitration only of the cost of alterations, reviewing the architect's certificate extending time, and damages by reason of delay, damages for money expended in paying unpaid bills of the contractor and for completing work which he left unfinished are not subject to arbitration.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 26, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

L. H. Prather, for appellant.

Gallagher & Thayer, for respondent.

ROOT, J.—In this case a motion was made to dismiss the appeal for the reason that neither proof of service of notice of appeal nor an appeal bond was filed within five days after the giving of the notice of appeal. The file mark on the bond indicated that it was filed November 27, 1905, but the appellant filed affidavits to show that as a matter of fact said bond was left with the clerk of the court for filing on November 18, 1905, the same day that the notice of appeal was served and left for filing. As this question could not be determined on affidavits in this court, and believing that the

¹Reported in 86 Pac. 1112.

appellant should not lose his right of appeal in case the fact was as he represented, this court granted permission to the appellant to bring the matter on for hearing before the superior court to determine whether or not said bond was left with the clerk as contended. 43 Wash. 480, 86 Pac. 657. We have now received a supplemental record from that court showing that, upon the hearing of this matter, the court found that said bond was left with the clerk of the superior court for filing on the 18th day of November, 1905. This being true, the fact that by an inadvertence of some kind the same was not marked filed until the 27th ought not to defeat the right of appeal. The motion to dismiss is therefore denied.

Appellant and respondent entered into written contracts, by which the former agreed to build for the latter a stone foundation for a building. It was alleged in the complaint that appellant had failed to comply with his contract, and that respondent had been obliged to pay \$1,686.03 in excess of the contract price in order to satisfy claims that were liens against respondent's property, and also alleging that by reason of appellant's default plaintiff was otherwise damaged in a large sum. Appellant admitted the contracts, but denied most of the principal allegations of the complaint. The case was tried before the court without a jury, and resulted in a judgment in favor of the respondent in the sum of \$1,966.41.

The principal contention of appellant is that the complaint does not state, and the evidence does not establish, a cause of action, in that the matters sued upon were such as should have been submitted to arbitration under the terms of the written contracts. Said agreements consisted of an instrument commonly known as the uniform contract, together with a supplemental agreement in writing as to certain matters not covered by the original instrument. The only provisions for arbitration are found in articles 3, 7 and 8, where provision is made for arbitrating the increased or decreased

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cost occasioned by alterations, for reviewing the architect's certificate in the matter of the extension of time, and for arbitrating damages sustained by either party on account of delay of the work. The damages claimed by respondent are all for money expended in paying off unpaid bills which appellant had contracted and which were liens against the building, with the exception of two items, one for \$54.27 and one for \$281.50, the former being for expense incurred in completing a foundation wall, and the latter being the amount paid for repairing the street that had caved in by reason of the manner in which appellant had excavated for the foundation. As to these two items the architect had audited and certified them as required by the contract. Certain exceptions are taken as to the rulings of the court in excluding evidence of claims made by appellant; but these were claims which should have been submitted to arbitration under the terms of the contract. One contention of appellant with reference to extra work on the piers was submitted to arbitration, and the arbitrators allowed him \$281.89, which the evidence shows to have been paid.

Numerous other matters are called to the attention of the court wherein it is claimed that the lower court erred, but they are mostly involved in the matters heretofore mentioned, or have to do with questions of fact upon which there was a conflict of evidence. On none of these matters have we reached a conclusion different from that of the trial court.

The judgment of said court is affirmed.

MOUNT, C. J., DUNBAR, CROW, FULLERTON, HADLEY, and
RUDKIN, JJ., concur.

[No. 6114. Decided October 13, 1906.]

G. W. HUNT, *Respondent*, v. C. B. UPTON *et al.*, *Appellants*.¹

SUBSCRIPTIONS—CONSTRUCTION OF RAILROAD—CONDITIONS AS TO TERMINUS—PERFORMANCE—QUESTION FOR JURY. In an action upon a subsidy agreement for the construction of a railroad to begin "at or near W. Junction" it is for the jury to say whether the contract was performed by beginning the railroad at H. Junction, about one mile from W. Junction, considering all the circumstances with due regard to the general direction, location, and length of the road.

SAME—CONSTRUCTION OF CONTRACT—LOCATION OF MAIN LINE. A subsidy agreement for the construction of a railroad from W. Junction to W. via Eureka Flat, "said road to extend to the head of Eureka Flat," is properly construed to authorize a main line between the specified termini via the locality known as Eureka Flat, with a branch line to the head of Eureka Flat, where it appears that, to require the main line to run to the head of Eureka Flat, would in effect make the main line two sides of a triangle enclosing an acute angle (RUDKIN, J., dissenting).

SAME—PERFORMANCE OF INDIVIDUAL—INCORPORATION OF COMPANY. A subsidy agreement for the construction of a railroad by an individual is complied with by him where the contract was completed by a railroad corporation which he incorporated for the purpose of obtaining a right of way, and of which he held substantially all the capital stock.

SUBSCRIPTIONS—CONSTRUCTION—SUBSTANTIAL PERFORMANCE. A subsidy agreement between individuals in aid of the construction of a railroad is not to be strictly construed, and a substantial performance of the contract is sufficient.

Appeal from a judgment of the superior court for Walla Walla county, Gilliam, J., entered October 12, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action on a subscription agreement. Affirmed.

Sharpstein & Sharpstein, for appellants.

Williams, Wood & Linthicum, Garrecht & Dunphy, and *Wm. T. Muir*, for respondent.

¹Reported in 87 Pac. 56.

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Opinion Per CROW, J.

CROW, J.—This action was commenced in September, 1893, to recover the sum of \$2,000 and interest upon the following contract:

“Walla Walla, W. T., April 1, 1888.

“Whereas, G. W. Hunt is contemplating the construction of railroads for the purpose of furnishing additional and cheaper transportation for that portion of Washington Territory lying south of Snake River, and parts of Umatilla county, Oregon, and is soliciting assistance therein; and whereas, the undersigned is desirous of obtaining such transportation; therefore, in consideration that said G. W. Hunt or his assigns, shall within nine months from the date hereof, build and put in operation in the usual manner a standard gauge railroad, beginning at or near Wallula Junction, Washington Territory, and extending thence eastwardly, via Eureka Flat to Walla Walla, Washington Territory, the said road to extend to the head of Eureka Flat and to be completed there by December 1, 1888, and to the city of Walla Walla, W. T., by January 1st, 1889, and shall transport or cause to be transported to some convenient harbor of shipment, at tide water on Puget Sound, all produce of the country that I shall desire to ship after the construction of said road, at a rate not to exceed the rate on such produce charged from Walla Walla to Portland, on other railroads. And to aid in the execution of said enterprise, I promise to pay G. W. Hunt or his assigns, the sum of two thousand dollars, one-half of the same to be due and payable when said railroad is constructed and put in operation between said Wallula and said Walla Walla, via Eureka Flat, and the remaining half in one year from that date, said sum to be payable in cash or good and merchantable wheat, at the rate of not less than fifty cents per bushel, delivered at any depot or shipping station on said railroad. The last payment to bear interest from date of completion of the railroad aforesaid, until paid at the rate of six per cent per annum. This agreement to be deposited with the Executive Committee of the Walla Walla Board of Trade, to be delivered by them only on compliance by said G. W. Hunt with the terms hereof on his part. Should said G. W. Hunt or his assigns fail to

complete said railroad within the time designated, this agreement to be null and void.

"Attest: J. C. Painter. (Signed) C. B. and Wm. H. Upton."

The plaintiff, G. W. Hunt, alleged that all of the conditions of said contract had been performed upon his part. The defendants admitted the execution of said contract, but in substance denied the other allegations of the complaint. Several affirmative defenses were pleaded, but as no evidence was admitted in support thereof, their consideration was withdrawn from the jury. From a judgment in favor of the plaintiff, this appeal has been taken.

It appears from undisputed evidence that said road was commenced at a point known as Hunt's Junction, about one mile from Wallula Junction; that it was built thence in a northeasterly direction to Eureka Station, located within that certain territory known as Eureka Flat, and that it was thence extended in a southeasterly direction to Walla Walla. It further appears that a branch line was built from Eureka Junction in a northeasterly direction to Pleasant View, which the respondent contends is located at the head of Eureka Flat. There is no serious contention but that the road as built was completed to Pleasant View and also to Walla Walla within the stipulated time. Nor is there any serious contention but that it maintained freight rates and rendered service to the public as required by the contract, at all times prior to the commencement of this action. The road as constructed was not built by G. W. Hunt personally. He organized a corporation known as the Oregon and Washington Territory Railroad Company, in which he owned substantially all of the capital stock, a few shares being held by others to perfect the organization, and said corporation built the road. He contends that he was obliged to act through the agency of said corporation, as he had to obtain a right of way, and that being unable to secure the same by purchase, he had to

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acquire it through said corporation under the right of eminent domain. He also contends that, in building the road through the agency of the Oregon and Washington Territory Railroad Company, he in fact built it himself, he being the promoting cause in securing its construction.

The trial court instructed the jury that it was for them to determine from the evidence, as an issue of fact, whether Hunt's Junction was "at or near Wallula Junction." The appellants at the trial contended and now contend that, as Hunt's Junction was one mile from Wallula Junction, it was not at or near said point, and that the respondent did not perform the conditions of the contract which required him to begin said road at or near Wallula Junction; that by reason thereof the appellants' motion for a nonsuit interposed at the proper time, should have been granted, and that the court erred in said instruction. We have carefully examined the evidence, and after considering the same in the light of all of the surrounding circumstances, and with due regard to the general location, direction and length of the road as built, think the court committed no error in submitting said issue to the jury.

The main line of the road from Hunt's Junction to Eureka Station covered a distance of about twenty-three miles, and from Eureka Station to Walla Walla a distance of about thirty-one miles. The distance upon the branch line from Eureka Station to Pleasant View was about nineteen miles. The evidence shows that the territory known as Eureka Flat, being several miles in width, commenced about six miles southwest of Eureka Station, which was located thereon, and extended thence about twenty-five miles in a northeasterly direction to, or possibly a short distance beyond, Pleasant View. The evidence as to whether Pleasant View, the northeasterly terminus of the branch road, was at the head of Eureka Flat, was conflicting, and this issue being properly submitted to the jury was decided in favor of the respondent.

On the trial the appellants contended that the contract contemplated the building of one continuous main line of road from some point at or near Wallula Junction, through Eureka Flat, to the head of said Flat, and thence to Walla Walla. In other words, that the head of Eureka Flat was to be located on the main line and that no branch line was contemplated. This would require the building of a continuous road, running first in a northeasterly direction to Walla Walla, the only termini being at Wallula Junction and Walla Walla. The evidence, which includes a map of said territory, indicates that such a line would in its general route approximate two sides of a triangle enclosing an acute angle at or near Pleasant View. The court, in instructing the jury, charged:

"It is the duty of the court to interpret and construe this contract and you must be bound by the construction of it given by the court, and I instruct you that it is not a contract to construct and operate a main line of railroad from a point at or near Wallula Junction, Washington, to Walla Walla, Washington, by way of the head of Eureka Flat, but it is a contract to construct a standard gauge railroad from a point at or near Wallula Junction, Washington, to Walla Walla, Washington, by way of Eureka Flat as a locality, and to extend either by a main or a branch line, a standard gauge railroad to the head of Eureka Flat."

The appellants have assigned error upon this instruction. We think the court's interpretation of the contract was right.

The principal contention upon which the appellants rely for a reversal is that the respondent is not entitled to recover as the road was not built by him or his assigns, but was built by the Oregon and Washington Territory Railroad Company. The court instructed the jury that, if the respondent procured the road to be constructed by said company, he had thereby complied with his contract in that regard. We think this construction of the contract was proper. The object of the appellants in making their subscription was to obtain a road which would secure them reasonable freight charges

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and service in shipping their produce. There can be no question but that the respondent was the procuring and promoting cause in the construction of the road. He could not secure the necessary right of way, and was therefore compelled to organize a corporation to exercise the right of eminent domain. He not only owned substantially all of the capital stock of the said corporation, but he caused it to be organized for the express purpose of obtaining the necessary right of way and constructing the road in compliance with the terms of the contract of subscription. We see no reason why he could not do this. Nor do we understand why the appellants should not be liable to him upon such performance.

The court further instructed the jury as follows:

"Before you can find for the plaintiff you must find from the evidence that there was a substantial compliance with the conditions of the written instrument, and in arriving at your conclusions as to whether he has substantially met the conditions put upon him by this contract you have a right to consider all the surrounding circumstances, the character of the country, and the character and number of the population. In other words you must try to put yourselves in the position of the parties at the time the contract was made and decide what was their intention."

The appellants now contend that prejudicial error was committed in giving this instruction. They insist that a strict performance of the contract was necessary in every respect, and that a substantial compliance therewith was not sufficient. They claim (1) that the road should begin at Wallula Junction and not one mile therefrom; and (2) that it should have been built by the respondent personally or by his assignees, and not by any corporation not his assignee. In support of this contention for a strict and technical performance of the contract, they cite, with others, the following cases: *Town of Birch Cooley v. First Nat. Bank*, 86 Minn. 385, 90 N. W. 789; *Memphis etc. R. Co. v. Thompson*, 24

Kan. 170; *Virginia etc. R. Co. v. Lyon County*, 6 Nev. 68; *Winona v. Minnesota R. Const. Co.*, 27 Minn. 415, 6 N. W. 795, 8 N. W. 148. These cases, upon a casual examination, might appear to sustain the position assumed by appellants, but in all of them the rights and powers of municipal corporations in voting subsidies in aid of railway construction, seem to be especially involved. The principal case upon which the appellants seem to rely is that of *Town of Birch Cooley v. First Nat. Bank*, *supra*, in which it appears that a municipal corporation had voted bonds in aid of the construction of a railway, thereby imposing an indebtedness upon all of its taxable property. The court held a strict compliance with all of the terms of the subscription contract to be a necessary condition precedent to the issue of said bonds, and in the course of its opinion, after stating the rule of substantial compliance as applied to building and similar contracts, said:

"This rule of substantial compliance, however, does not apply to contracts for the issuing of municipal bonds to aid in the construction of a railway; for they are not within the reason of the rule. In such cases, whether the bonds are delivered or not, neither the railroad nor any part thereof ever becomes the property of the municipality; but the ownership thereof remains unimpaired in the railroad company. It parts with nothing. *Memphis etc. R. Co. v. Thompson*, 24 Kan. 182. The issuing and delivery of the bonds in such a case as this one are, and can only be, authorized by the vote of a majority of the electors of the municipality, and no officers thereof can modify or waive the conditions upon which the electors vote to authorize the delivery of the bonds. . . . Again, where a majority of the voters of a town, whether they own any property therein or not, are authorized to, and do conditionally, incumber all of the property within the limits of the town to provide a bonus to a railroad company, strict performance of all of the conditions should be exacted of it."

Later on in its opinion the court quotes with approval the following language from *State ex rel. Minneapolis etc. R. Co. v. Minneapolis*, 32 Minn. 501, 21 N. W. 722:

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Dissenting Opinion Per RUDKIN, J.

"It hardly needs the citation of authorities to sustain the proposition that when a municipal corporation votes its bonds to aid the building of a railroad on certain terms and conditions, it is entitled to a strict and full compliance with all these terms and conditions on the part of the railroad company before the latter is entitled to the bonds."

From this language it is apparent that a strict rule was invoked on behalf of a municipal corporation, which had endeavored to impose a burden of indebtedness upon all of its taxable property. No financial obligation of any municipal corporation is in question in this action. Although the contract here involved provides for a subsidy in aid of railroad construction, nevertheless it is between private individuals, and affects their rights only. It neither involves the power of taxation nor the right of a municipality to issue its bonds in aid of railway construction.

In *Virginia etc. R. Co. v. Lyon County, supra*, cited by appellants, the court recognized the rule that a substantial compliance with the terms of a subsidy contract was sufficient. But as there was an absolute failure on the part of the railroad company to carry out the provisions of its contract in a material respect, it was held not entitled to recover.

We have carefully examined the entire record, including the instructions given, and those refused, and from such examination are unable to conclude that any prejudicial error has been committed. The appellants have had a fair trial. The verdict is sustained by the evidence. No prejudicial error was committed in admitting or rejecting evidence, nor in denying appellants' motion for a nonsuit, nor in overruling their motion for a new trial.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and ROOT, JJ., concur.

RUDKIN, J. (dissenting).—It seems to me that the contract in suit clearly calls for the construction of a continuous line of road from at or near Wallula Junction to Walla Walla by

way of the head of Eureka Flat, and that such contract is not complied with by the construction of a road from at or near Wallula Junction to Walla Walla, through Eureka Flat, with a branch or spur running to the head of the Flat. In other words, I think the main line should extend to the head of the Flat, and not a branch or spur from the main line. I therefore dissent.

[No. 6121. Decided October 18, 1906.]

A. J. ALBRING *et al.*, *Appellants*, v. EMANUEL PETRONIO,
Respondent.¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—FORECLOSURE—STATUTES—CONSTRUCTION. Statutory provisions for the foreclosure of local improvement assessments are to be strictly construed, and an exact compliance with every requirement enforced.

SAME—SALE—NOTICE TO OWNER—PAYMENT OF TAXES DURING PERIOD OF REDEMPTION. Bal. Code, § 814, securing to the holder of a certificate of sale of land for a local improvement assessment a lien for the amount paid and for taxes levied previously or subsequently, requires such holder to pay subsequent taxes during the period of redemption as an additional means of notice to the owners of the land.

SAME—NOTICE OF APPLICATION FOR DEED—DILIGENCE IN ASCERTAINING ADDRESS OF OWNER. Bal. Code, § 815, requiring the holder of such a certificate to give notice, by personal service or by publication, to the owners of the land that demand for a deed will be made, contemplates personal service if possible, and diligent search for the owner; and a holder who fails to pay subsequent taxes, or make inquiry at the office of the county treasurer for the address of the owner who had paid such taxes, does not exercise the diligence required of him by the statute before a deed can be issued.

Appeal from a judgment of the superior court for King county, Yahey, J., entered December 22, 1905, in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to set aside a special assessment foreclosure and to quiet title. *Reversed*.

¹Reported in 87 Pac. 49.

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Citations of Counsel.

Harrison B. Martin and *Byers & Byers*, for appellants. The appellants being residents of this state, were entitled to personal notice. *Bardwell v. Collins*, 44 Minn. 97, 46 N. W. 315, 20 Am. St. 547, 9 L. R. A. 152; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Washington Avenue*, 69 Pa. St. 352, 8 Am. Rep. 255; *In re Smith's Petition*, 9 Wash. 85, 37 Pac. 311, 494. Enforcing a special assessment without notice to the owners is a taking of property without due process of law. *Scott v. Toledo*, 36 Fed. 385; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419.

William Hickman Moore and *G. Edgar Hayes* (*Dallas V. Halverstadt*, of counsel), for respondent, contended, among other things, that the title of the act was sufficient. *Laidlaw v. Portland etc. R. Co.*, 41 Wash. 292, 84 Pac. 855; *Seattle etc. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817. The failure to make findings was not error when the same were not requested. *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173; *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003; *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490. The legislature may provide for notice by publication in such cases. *King v. Portland*, 184 U. S. 61, 22 Sup. Ct. 290, 46 L. Ed. 431; *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900; *Fallbrook Irr. District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *City of St. Joseph v. Truckenmiller*, 183 Mo. 9, 81 S. W. 1116; *Meier v. St. Louis*, 180 Mo. 391, 79 S. W. 955; *State v. Chicago etc. R. Co.*, 80 Iowa 586, 46 N. W. 741; *State v. Chicago etc. R. Co.*, 68 Iowa 135, 26 N. W. 37; *Wilson v. Hathaway*, 42 Iowa 173; *Eysell v. St. Louis*, 168 Mo. 607, 68 S. W. 893;

Kansas City v. Ward, 135 Mo. 172, 35 S. W. 600; *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513; *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236.

Crow, J.—On December 19, 1890, the plaintiffs A. J. Albring and Alice F. Albring, husband and wife, purchased in the name of said A. J. Albring, as their community property, lots 3 and 4 in block 2 of Prospect Terrace Second Addition to the city of Seattle, and having promptly recorded their deed, have ever since owned the same, unless their title has been divested by the proceedings hereinafter mentioned. On October 30, 1899, in pursuance of the provisions of the eminent domain act of 1893, Bal. Code, § 775 *et seq.* (P. C. § 5050), the council of the city of Seattle passed Ordinance No. 5624, entitled:

“An ordinance laying out and establishing a public street in the city of Seattle, commencing on the south margin of Yakima avenue and running thence southeasterly across block two (2) of Baxter's Addition to the city of Seattle and across lot one (1) of block three (3) of said addition to an intersection with the west margin of Thirtieth avenue south at a point sixty (60) feet south of the south margin of Norman street, and providing for the taking and damaging of the land and other property necessary therefor, and for the ascertainment and payment of the just compensation to be made for the private property to be taken or damaged for said purpose, and for an assessment upon the property benefited for the purpose of making such compensation.”

After the passage and approval of the ordinance, the city filed in the superior court of King county its petition, praying that just compensation be made for the lands and property to be taken and damaged. Afterwards it filed a supplemental petition for the appointment of commissioners to make a special assessment on the lands to be specially benefited by said improvement. An assessment district was cre-

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ated, which included said lots 3 and 4, and an assessment of \$12 was levied against each of them. Afterwards said assessment was certified to the treasurer of said city, who, on the 27th day of March, 1901, sold said lots for the purpose of collecting said assessments which had become delinquent. Said sale was made to one Carrie B. Osborne, who paid \$30 for lot 3 and \$27 for lot 4, and said treasurer issued to her two certificates of purchase which were recorded in the office of the auditor of King county, Washington. Afterwards said Carrie B. Osborne assigned said certificates to the defendant Emanuel Petronio. On the 23d day of October, 1903, the period of redemption having expired, and said Emanuel Petronio having published notice to the plaintiff A. J. Albring, said city treasurer executed to him two separate deeds for said lots, which he caused to be recorded on October 31, 1903.

It appears from undisputed evidence that the plaintiffs, A. J. Albring and wife, at all times from the date of their purchase of said real estate in 1890, until the commencement of this action, resided in the city of Spokane; that their place of residence was unknown to the commissioners who made said assessment, to the officials of the city of Seattle, or to said Emanuel Petronio, or to any of them; but was known at the office of the treasurer of King county; that said plaintiffs at no time prior to the execution and recording of said deeds to Emanuel Petronio had any actual notice or knowledge or means of obtaining knowledge, that said ordinance had been passed, that said improvement had been made, that said assessment had been levied, that the same had become delinquent, that said sale had been made, or that said deeds had been executed and delivered to the defendant Emanuel Petronio. In fact, they were at all of said times entirely ignorant of the pendency and progress of any of said proceedings. It appears that said lots, although within the assessment district, were located at a point

of from one-fourth to one-half a mile distant from said improvement; that had the plaintiffs gone upon their property and inspected the same, they would not have observed any improvements being made, nor would they have come into the possession of facts tending to put them upon inquiry; that said lots were at all of said times vacant and unimproved; and that they were of the reasonable total value of \$1,000. During the entire two-year period of redemption granted by Bal. Code, § 815 (P. C. § 5089), and at all times prior to the execution and delivery of said deeds, the said plaintiffs promptly paid all general taxes levied against said lots, remitting the same to the treasurer of King county, Washington. Their first knowledge of said assessment proceedings or of the execution and delivery of said deeds was obtained in the year 1904, when they tendered payment of the state and county taxes for the year 1903, and were informed by the county treasurer that payment had been made by the defendant Petronio, who claimed to own the property. Thereupon the plaintiffs made an investigation, and for the first time learned the facts. They immediately tendered to the said Emanuel Petronio the full amount of said assessments with all penalties, interest and costs, and all subsequent assessments and taxes paid by him, which tender being refused this action was instituted to set aside said certificates of purchase and tax deeds, to declare the same void, to quiet their title to said property, and to permit the plaintiffs to redeem. The plaintiffs have pleaded all of the facts above set forth, and the defendant in his answer has also pleaded as the source of his alleged title the various proceedings culminating in said assessment, sale and deeds. There is no substantial dispute as to the facts involved in this case. The trial court, after refusing findings requested by the plaintiffs, without making any findings whatever, entered a decree dismissing their complaint. From said final judgment this appeal has been taken.

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The appellants have made numerous assignments of error, contending in substance (1) that the statute under which said proceedings and pretended sale have been conducted is unconstitutional; (2) that their property has been taken without due process of law; (3) that they were entitled to judgment upon the pleadings for which their motion was denied; and (4) that if said eminent domain act is held to be constitutional, it must be strictly construed as against the respondent who claims title under the proceedings therein authorized.

It is always the duty of the courts to sustain the constitutionality of legislative enactments if they can possibly do so. By reason of the view which we take of said act in so far as it affects this action, it will not be necessary to question its constitutionality in any particular. The record before us shows that all notices to the appellants during the entire course of these proceedings were given by publication, their address being unknown to any of the city officials or the respondent. The purpose of such publications was to advise the parties interested of the nature and pendency of the various proceedings, so that if possible they might have actual notice of the same. It is conceded that such a result was not accomplished in this case. The appellants now contend that said eminent domain act, if constitutional, should be strictly construed, as it strongly derogates from usually accepted ideas of property rights. We think this contention should be sustained. The respondent's only claim of title is under these proceedings. He has purchased property of the value of \$1,000 for the small sum of \$57, with such additional expenses and taxes as he may have since disbursed, which are merely nominal. If he is to obtain and retain the legal title, he should be permitted to do so only upon an exact compliance with every requirement of the statute strictly construed as against him.

Bal. Code, § 810 (P. C. § 5084), provides that, when the sale is first made by the treasurer, he shall issue to the pur-

chaser a certificate which must be recorded in the office of the county auditor within three months from the date thereof. Bal. Code, § 814 (P. C. § 5088), secures to the purchaser holding such certificate a lien on the lot or parcel of land sold for the amount paid by him, as well as for all taxes and special assessments and all interest, penalties, cost and charges thereon, whether levied previously or subsequently to such sale, and whether for state, county, city, or town purposes, subsequently paid by him, and that he shall be entitled to interest at the rate of twenty per cent per annum on the original amount paid, and such subsequent payments, from the date of the respective payments. This provision undoubtedly contemplates that the certificate shall not convey a title, but shall only secure to the purchaser during the period of redemption a lien for the sums mentioned. It also contemplates that the holder of said certificate shall, during the period of redemption which is guaranteed by § 815, pay all taxes and public charges against said property whether the same be for state, county, city or town purposes. Neither the respondent nor his assignor ever made any payments of general taxes during said period. The record does not show that they ever tendered any such payments, nor does it explain why such payments were not made by them. We think one purpose of this provision for the payment of such taxes by the holder of the certificate, is to furnish an additional means of actual notice to the owners of the property that the assessment has been levied, that the preliminary sale has been made, and that the certificate has been issued, so that they may obtain such actual knowledge in ample time to redeem. In this instance the appellants were deprived of this opportunity, the respondent and his assignor having failed to make such payments. Section 815, after providing for a period of redemption of two years, also provides that said redemption may be made by the owner upon payment of the amount for which the lots were sold, with interest at the rate of twenty per cent per annum, to-

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gether with all taxes, special assessments and interest, penalties and charges thereon paid by the purchaser with like interest thereon. Said section further provides, that unless written notice of taxes and assessments subsequently paid, and the amount thereof, shall be lodged with the treasurer, redemption may be made without including the same. This provision not only contemplates that the holder of the certificate of purchase shall pay these general taxes and other charges, but also that he shall, for the protection of his lien, file written notice of such payment with the city treasurer.

Said § 815 further provides that, before a deed shall be made, the holder of the certificate of sale shall have notified the owners of said lots or parcels of land that he holds said certificate, and that he will demand a deed therefor; that said notice shall be given by personal service, or by publication in a weekly newspaper published in said city once each week for three successive weeks. Our construction of this statute is that it contemplates a personal service if it can possibly be made. This being true, the holder of the certificate should make an honest and diligent search for the owner. If the owner cannot thus be found, then service by publication may be made. In this instance the respondent is not shown to have had any actual knowledge of the postoffice address or residence of the appellants, nor is he shown to have made any such search; but the record shows that said appellants had, during the entire period of redemption, been paying the general taxes upon this property, and that the county treasurer had their postoffice address. The respondent himself failed to make such payment of taxes. If he was acting in good faith, he could only have done so by reason of the fact that the payments were first made with such promptness by the appellants as to prevent payment by him. But if this was the case, the address of the appellants would certainly have been obtainable at the office of

the county treasurer, and could have been readily learned by the respondent. If he failed to call at said office and tender payment of the state and county taxes as was his duty, he thereby intentionally or unintentionally deprived himself of an opportunity for learning the address of the appellants, which would have enabled him to serve them with personal notice. This was an act of omission upon his part for which the appellants are in no way responsible, but which resulted in preserving their profound and excusable ignorance of any of the proceedings. Said § 815 further provides that the treasurer's deed shall be executed only after payment of all subsequent taxes and special assessments on said lots. This provision evidently contemplates that, as a condition precedent to the obtaining of said deeds, a showing must be made to the city treasurer that all taxes and special assessments which have become due either prior or subsequent to the original sale have been paid. This being true, the respondent necessarily was obliged to ascertain whether said taxes and assessments had been paid. Had he done this, he would have learned before the execution of the deed that their payment had been made by the appellants, and necessarily would have also learned the appellants' address.

Our view is that this statute must be strictly construed as against the respondent; that he must be held to a complete and exact compliance with all of its provisions as a condition precedent to obtaining his deeds. Had he succeeded in giving personal notice to the appellants, a less stringent rule might be invoked in his behalf. He failed to pay said taxes, to attempt their payment, or to explain their nonpayment by him. He permitted their payment to be made by the appellants during the period of redemption. He failed to avail himself of an opportunity which he had during the period of redemption for obtaining knowledge of the appellants' postoffice address and place of residence, and has thereby placed himself in a position which he may think will

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excuse his having given them notice by publication instead of personal service. This is an action in equity and, under these circumstances, we think appellants are in equity and good conscience entitled to redeem said property. Were we to hold that the appellants are without remedy, we would be placing a construction upon said statute which would enable unscrupulous persons to avail themselves of its provisions as a means of fraud and oppression against innocent owners of property. This we should not do. Our duty is to so construe it that it may be available as a reasonable and proper measure for the collection of delinquent assessments as contemplated by the legislature. While there is nothing in the record affirmatively showing any intentional fraud on the part of the respondent, yet if a purchaser at a sale of this character can be permitted to hold his certificate for two years during the entire period of redemption, without the payment of taxes, without any showing why such payment was not made, without the suggestion of an effort to learn the place of residence of the true owner, and can then obtain a deed depriving the ignorant and innocent owner of his title, then the statute would become a most vicious instrument for the perpetration of fraud. Considering the entire statute, we are constrained to believe that the legislature in drafting it made these various provisions to which we have referred in order that every opportunity might be afforded an owner to obtain actual notice of the assessment and sale before the period of redemption had expired. The long period of redemption which it guarantees, the provision for the payment of the taxes by the holder of the certificate, the requirement that notice be given, the requirement that written notice of all taxes paid by the purchaser must be filed with the city treasurer, and the further requirement that all taxes must be paid before a deed can be obtained, show a legislative intent to require such steps to be taken as would ordinarily result in bringing actual notice home to the owners of the property.

There has been a complete failure upon the part of the respondent to comply with these provisions. Our holding is that, when a certificate of purchase is obtained, it is the duty of its holder to pay all general taxes and all public charges against said property. If any reason exists why he cannot do so, some affirmative showing should be made to explain his omission. The appellants have at all times since learning of said assessment been ready and willing, and are now ready and willing, to pay said assessment, together with costs, taxes and charges, with twenty per cent interest. In fact, they have tendered payment and have kept their tenders good. We think they are in equity entitled to redeem.

It is ordered that the judgment of the superior court be reversed, and that this cause be remanded with instructions to the trial court to permit the appellants to redeem, and in doing so to ascertain the amounts due the respondent for the disbursements made by him with twenty per cent interest thereon, as provided by Bal. Code, § 814.

It is further ordered that, if prior to the commencement of this action the full amount then due had been tendered by the appellants, they recover their costs in the superior court; that otherwise the respondent recover said costs. It is further ordered that, in estimating the amount due, the appellants, if a full tender was made by them prior to the commencement of this action, shall be charged twenty per cent interest on the respondent's disbursements to the date of said tender only, and that no further interest be allowed; otherwise that interest be allowed at said rate until the date of payment. The appellants will recover costs in this court.

MOUNT, C. J., ROOT, DUNBAR, RUDKIN, and HADLEY, JJ.,
concur.

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[No. 5051. Decided October 15, 1906.]

M. W. MERRITT *et al.*, *Respondents*, v. RUSSELL & COMPANY,
Appellant.¹

CHATTEL MORTGAGES—RECORDING—REMOVAL TO ANOTHER COUNTY—STATUTES—REPEAL—CONSTRUCTION. Bal. Code, § 4559, providing that mortgaged chattels removed to another county shall be discharged from the lien, as against third persons, unless within thirty days the mortgagee takes possession or records the mortgage in the new county, is not impliedly repealed by Laws 1899, p. 157, covering the subject of recording chattel mortgages, but making no provision for a second recording of removed property; since it is not repugnant to the later act, and repeals by implication are not favored.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered September 16, 1905, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a purchaser to enjoin the sale of property under a chattel mortgage. Affirmed.

James A. Williams and *Denton M. Crow*, for appellant.

Post, Avery & Higgins, for respondents.

Root, J.—On August 29, 1900, one G. A. Grimes, the then owner of certain personal property situate in Whitman county, Washington, executed and delivered to appellant, Russell & Company, a corporation, a chattel mortgage thereon, which chattel mortgage was filed in the office of the auditor of Whitman county, Washington, the county in which the property then was situate, on September 12, 1900. Some time after the filing of the chattel mortgage, the mortgaged property was removed by Grimes to Spokane county, and was, on June 9, 1902, purchased by respondents, who had no notice of appellant's mortgage except such notice as was given by the filing in Whitman county. Appellant's mortgage was not

¹Reported in 87 Pac. 70.

filed in Spokane county until after the purchase by respondents. On May 16, 1904, appellant placed a certified copy of its chattel mortgage in the hands of the sheriff of Spokane county and delivered to such officer notice of mortgage sale, and the sheriff was advertising the property to be sold under said mortgage when this action was begun by respondents to enjoin the sale. Upon a trial, judgment was entered in favor of respondents, adjudging that they were the owners of the property, freed from any lien under appellant's mortgage.

The only question which arises on this appeal is, was the filing of appellant's mortgage in Whitman county sufficient notice to charge respondents with constructive notice when purchasing the property after its removal to Spokane county? Bal. Code, § 4559 (P. C. § 6532), enacted in 1879, reads as follows:

"A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that purpose. When personal property mortgaged is thereafter removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof unless either:

"(1) The mortgagee within thirty days after such removal causes the mortgage to be recorded in the county to which the property has been removed; or . . .

"(3) The mortgagee within thirty days after such removal takes possession of the property; . . ."

Appellant contends that this section of the statute is repealed by the act of March 13, 1899 (Laws 1899, p. 157, ch. 98). The act just mentioned contains no repealing clause, and contains no provision for recording a chattel mortgage other than in the county where the property exists at the time of the execution of the mortgage. There is no direction as to what shall be done in case the property mortgaged is removed from the county where the mortgage was made and filed. The only reference to property existing

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in more than one county is found in § 7, which reads as follows:

“That in case the property mortgaged exists in two or more counties, a copy of such mortgage may be filed in each of such counties with like force and effect as the original mortgage.”

This section evidently refers only to the property which exists in two or more counties at the time of the execution of the mortgage. Section 3 of said act, among other things, said:

“Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world, of the existence and conditions thereof”

It is appellant's contention that, under this section, the filing and indexing of a mortgage in Whitman county, where the property existed at the time the mortgage was executed, constituted constructive notice to the respondents, and to all other persons, of the existence and the conditions of said mortgage. Whether or not this is true must depend upon the question as to whether or not said § 4559 is repealed by the act of 1899. The latter act not purporting to cover the entire subject-matter of the former statute, and having no repealing clause, and repeals by implication not being favored, it follows that the provision in § 4559 for the recording of the mortgage in the county to which the property has been removed is still in force, unless there be something in the act of 1899 repugnant thereto. We can find in the latter act no such inconsistent provision. Therefore, the appellant not having within thirty days after the removal of the property from Whitman to Spokane county caused the mortgage to be recorded in the latter county, and not having within said period taken possession of the same, its lien thereupon, as against these respondents who purchased

the property in good faith and without knowledge of the mortgage, became ineffectual.

The judgment of the trial court is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

Crow, J., having been of counsel, took no part.

[No. 8486. Decided October 17, 1906.]

ARTHUR D. JONES & COMPANY, *Respondent*, v. SPOKANE VALLEY LAND & WATER COMPANY, *Appellant*.¹

APPEAL—DISMISSAL—STIPULATION AS TO TIME FOR PERFECTING APPEAL. An appeal will, on motion, be dismissed where the same was not perfected within the time specified by a stipulation entered into before trial, wherein it was agreed that any appeal should be taken in time for assignment on the calendar of a certain term, and should be dismissed if the appellant fail so to do (FULLERTON, J., dissenting).

Motion to dismiss an appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 6, 1906. Granted.

Happy & Hindman, and *Allen & Allen*, for appellant.
Gallagher & Thayer, for respondent.

MOUNT, C. J.—The respondent moves to dismiss the appeal in this case upon the ground that the appellant has failed to perfect the appeal so that the same might be assigned for hearing upon the October, 1906, calendar of this court. It appears that, while the cause was pending in the lower court, the parties by their attorneys entered into a stipulation which was in writing and filed as a part of the

¹Reported in 87 Pac. 65.

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Opinion Per MOUNT, C. J.

records in the cause, as follows, omitting the title of the cause and the signatures:

"It is hereby stipulated by and between said plaintiff and said defendant the Spokane Valley Land and Water Company, that the above entitled cause shall be tried on July 2, 1906; and that if either party desires to have the testimony of D. C. Corbin, the trial shall be adjourned for completion until a later day in July, 1906, at which time his testimony may be taken as a part of the trial. It is further stipulated that either party desiring to appeal from the final judgment in said cause must perfect any such appeal and serve their briefs and file their transcript in time so that said cause may be assigned and heard at the October, 1906, term of the supreme court of said state, and if the appellant fail so to do, the appeal shall be dismissed and no new appeal taken. This provision not to apply if appeal is dismissed for any other reason. Dated June 20th, 1906."

The record on appeal was not filed in this court in time to be assigned for hearing, and the case was not assigned upon the October calendar. Respondent thereupon moved to dismiss.

"The parties may bind themselves by a stipulation waiving the right of appeal." And "the attorney of record may bind his client without special authority by a stipulation waiving the right of appeal." 20 Ency. Plead. & Prac., pp. 636-7.

"An agreement of a party to waive the right of appeal will be recognized as a binding contract by the courts. It must be supported by a sufficient legal consideration, and the contract must be express, in writing, and made a part of the record in the cause." 2 Ency. Plead. & Prac., p. 173.

The foregoing rules seem to be supported by abundant authority cited in the foot notes in the volumes from which the rules are quoted. Counsel for appellant does not contend that the stipulation was invalid or without consideration or authority, but seeks to avoid a dismissal of the case upon the ground that he supposed the October term began upon the fourth Monday instead of the second Monday in

October, 1906. We think this is not a sufficient excuse. It was counsel's duty to know exactly when the term began. The statute, Bal. Code, § 4652 (P. C. § 4328), and the rules clearly provide the dates for the beginning of each session. If counsel did not know the dates upon which the sessions began, when he entered into the stipulation, it was his duty to inform himself and to comply with his stipulation to have the appeal in this court in time. Counsel for respondent are in no wise to blame. They have placed nothing in the way, but the record shows they have expedited the appeal whenever possible to do so, and no blame for the delay can attach to the respondent.

The appellant having wholly failed to comply with the stipulation, the respondent is clearly entitled to have the appeal dismissed, and it is so ordered.

DUNBAR, CROW, ROOT, and HADLEY, JJ., concur.

FULLERTON, J. (dissenting.)—If the record in this cause presented the question decided by the majority, I would have no hesitancy in concurring in the conclusion reached, as I think a litigant may for a valuable consideration stipulate away his right of appeal, as he may other rights the law affords him. But as I view the record it presents an entirely different question than the one determined. In addition to the stipulation recited in the main opinion, the parties, by their attorneys, at a later date entered into another stipulation by which they agreed that the cause should be set down for hearing at the present session of this court. Through the inadvertence of counsel this stipulation did not reach the clerk in time to comply with the rule, and he very properly did not place the cause upon the calendar. After it was learned by counsel that the cause was not placed on the calendar the motion to dismiss was filed. At the hearing counsel for the moving party frankly stated that the purpose of these stipulations (as must be apparent from the very stipulations themselves) was to procure a hearing of the appeal

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at the present session of this court, and he proffered, in case the court would permit the appeal to be heard at this session, to waive his motion to dismiss and allow the case to go on the calendar, on such terms as this court might deem just. The opposing counsel, on this statement being made, consented to the imposition of terms—in fact he had previously indicated that he ought to be punished by the imposition of terms rather than by a dismissal of his appeal. The question presented to the court, therefore, is not, may a litigant waive his right of appeal, but is, rather, will this court to save the penalty of dismissal consent that a cause not technically entitled to go upon the present calendar be put thereon.

On the question actually before us I think the decision wrong. It seems to me not only to strike too harshly at the particular litigant but to be contrary to the purpose and spirit for which the court was created. This court, like an inferior court, has for its primary purpose the hearing of causes upon their merits, and when it dismisses appeals for a mere failure to comply with some rule governing the practice not going to its jurisdiction, it does violence to the purposes for which it was created. Here the question presented is not jurisdictional; it is one on which the court may exercise its discretion; and to deny the appellant a hearing of his appeal on its merits seems to me to be so far arbitrary as to give him just grounds for complaint. In my opinion the cause should be placed on the calendar and heard at this term of court, and I therefore dissent from the ruling of the majority.

[No. 6286. Decided October 18, 1906.]

THE STATE OF WASHINGTON, *on the Relation of J. H. McDonald, Plaintiff*, v. R. S. STEINER, *Judge of the Superior Court for Okanogan County, Respondent.*¹

MANDAMUS—TO COMPEL TRIAL—ACTIONS—STAY—DISCRETION OF COURT. Mandamus does not lie to control the exercise of discretion by a trial judge in refusing to proceed with the trial of an action for damages upon an injunction bond, until after a second action between the same parties to determine the rights of the parties in and to the property damaged is first brought to an issue and tried, or the two actions tried together, where the business of the court so requires or would be facilitated thereby.

Application filed in the supreme court, June 23, 1906, for a writ of mandamus directed to the superior court for Okanogan county, Steiner, J., to compel the setting of a cause for trial. Writ denied.

Peter McPherson, for plaintiff.

E. Fitzgerald, for respondent.

CROW, J.—This is an application for a writ of mandamus to be directed to the Honorable R. S. Steiner, judge of the superior court of the state of Washington in and for Okanogan county, commanding him to proceed with the trial of an action. The relator, J. H. McDonald, alleges that he is the plaintiff in an action for damages on an injunction bond now pending in the superior court of Okanogan county, wherein C. A. Blatt, as principal, and Burt Hawthorn and H. G. Bragg, as sureties, are defendants; that after personal service the defendants filed their motion to quash the summons; that prior to the hearing of said motion the relator filed his motion for a default; that the motions for default

¹Reported in 87 Pac. 66.

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and to quash service were heard and overruled, the defendants being granted fifteen days within which to plead; that the defendants having failed to answer or demur, the relator filed a second motion for default; that prior to the hearing thereof the defendants demurred to the complaint; that afterwards the second motion for default was granted, whereupon the relator moved the court to empanel a jury to fix the amount of his damages; that the defendants made an application to set aside the default, which application was, on February 13, 1906, denied, and the cause was continued until the May, 1906, term of the court; that on May 9, 1906, the relator renewed his request to the court to set a time for taking evidence in support of his claim for damages, but that the respondent peremptorily refused to set any time for the taking of evidence, and also refused to hear the cause until another action wherein C. A. Blatt was plaintiff and the relator, J. H. McDonald, was defendant, should be tried and determined.

Upon the relator's application, an alternative writ of mandamus was issued, directing the respondent to proceed with the trial, or appear in this court and show cause why he should not do so. The respondent has filed his answer, from which it appears that, during the year 1905, one C. A. Blatt, being the C. A. Blatt mentioned in the relator's affidavit, instituted an action in the superior court of Okanogan county against J. H. McDonald, the relator herein, to determine Blatt's right to the exclusive possession of a tract of land embraced within certain mining claims in Okanogan county; that in said action a temporary order was granted, enjoining McDonald from fencing the land in controversy; that an injunction bond was given, in which Blatt was principal and Hawthorn and Bragg were sureties; that upon trial, a nonsuit was entered upon the motion of McDonald, the action was dismissed, and the restraining order was dissolved; that the action now prosecuted by McDonald concerning which

complaint is made herein, was brought on the injunction bond to recover damages against Blatt as principal and Hawthorn and Bragg as sureties; that shortly thereafter Blatt instituted a second action against McDonald, setting forth the same cause of action alleged in his former suit, but that issue of fact has not been joined therein; that at the May, 1906, term, McDonald demanded of the respondent that his damage suit be set for trial; that thereupon the respondent stated to McDonald that in respondent's opinion McDonald's right to damages would depend in a large degree upon a determination of the issue whether Blatt was in fact the true owner of the mining claims during the time involved in the controversy; that the question of Blatt's ownership and right of possession was raised in his second action against McDonald; that respondent considered it necessary to determine such question before there could be an intelligent consideration of McDonald's claim for damages; that if McDonald would join issue with Blatt in his second action, the court would set both cases for trial and would either try them together or in consecutive order, the respondent's intention being to first try the Blatt case; that the respondent had declined to set the damage suit for trial until both actions were at issue; that respondent further stated to McDonald, as a reason for his action, that the increasing volume of business in the four counties of his judicial district made it necessary for him to economize his time as much as possible; that the two pending actions were between the same parties; that the same witnesses would be necessary in the trial of each; that the issues in the one would materially affect the issues in the other, and that he deemed it proper to set the two cases for trial at the same time.

This proceeding is now before us for determination upon the relator's affidavit and the respondent's answer. Certified copies of the pleadings and orders in the case of *McDonald v. Blatt et al.*, have been filed in this court for our consideration in connection therewith. These records show that the

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principal damages claimed by the relator McDonald in his action on the injunction bond are alleged to have been incurred by reason of the loss of crops from the land involved in the controversy between himself and Blatt. The merits of the alleged right of Blatt to either ownership or possession were not determined in the original action in which the nonsuit was granted, but the respondent contends that the same will necessarily be determined in the second action brought by Blatt against McDonald. Respondent doubtless entertained the view that, if Blatt was at all times entitled to the possession of the land, the amount of damages which the relator McDonald would otherwise be entitled to recover would be materially decreased. It is not necessary for us to pass upon the correctness of this view. It does appear, however, that the respondent, in refusing to immediately call a jury and try the cause, was exercising his judicial discretion. A writ of mandamus will not issue to control the discretion or review the judicial action of a trial judge, although it is a proper remedy to compel a court to proceed with the trial of a cause when it refuses to do so, upon the erroneous view that it has no jurisdiction, or when it makes such refusal arbitrarily.

Mr. Spelling, in the second edition of his work on Injunctions and Other Extraordinary Remedies, at § 1394, uses the following language:

“Mandamus is the appropriate remedy at the hands of superior and supervisory courts to set the machinery of inferior courts in motion. It does not direct how such courts shall act, or to what effect they shall exercise their powers, but only to compel action when they refuse to act at all, and have come to a standstill. Superior courts having general superintending control of all inferior courts may, in the maintenance of such control, issue, hear, and determine writs of mandamus, whenever there is a failure or a refusal of an inferior tribunal to act in a matter in which it is its plain duty to act and its refusal deprives or bars anyone of a substantial, legal, or equitable right.”

Again, at § 1409, the same author says that the granting of a continuance or a stay of proceedings is for the most part a matter within the discretion of inferior courts, not subject to control by mandamus.

“As a general rule a continuance should be granted upon facts that show that justice requires that the cause should await the trial and conclusion of another suit between the same parties; but the parties to the two actions must be identical, the issues must be the same, and it is essential that the entire relief demanded and sought for in the first action can be awarded in the other. It seems that the granting of a continuance or motion to stay in such cases is governed by the same rules as in the plea of another action pending, and the test lies in the fact whether the evidence would support both actions. The granting or refusal of a stay of proceedings in such cases is in a measure discretionary with the court, but this discretion should not be so extended as to deprive a party of all remedy for his cause of action.” 9 Cyc. 88, 89.

We think the respondent was exercising his judicial discretion in refusing to empanel a jury to assess damages until an issue could be obtained and trial also had in the second action brought by said Blatt against McDonald, and we fail to find that he acted arbitrarily or that he has abused such discretion. The parties and the issues in the two actions are substantially the same, and it may be that before entire relief can be granted the second action instituted by Blatt against McDonald should be tried. The respondent has not arbitrarily refused to proceed, nor has he refused to take jurisdiction. If the relator is anxious for a trial, he can obtain the same at an early date by forcing an issue in the second action brought by Blatt. When he does this, the respondent will proceed to try both actions with such promptness as the business of his court will permit.

The application for a peremptory writ is denied.

MOUNT, C. J., ROOT, DUNBAR, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

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[No. 6459. Decided October 19, 1906.]

ALEX POLSON *et al.*, Respondents, v. THE CITY OF ABERDEEN,
Appellant.¹

DEDICATION — BOUNDARIES OF PLAT BORDERING ON RIVER — CONSTRUCTION. Where the banks of a river had been washed away after the meander line was established, and subsequently a plat of an addition bordering on the river showed the length of the fractional lots as running to the edge of the grass line on the river bank, and in the survey, stakes marked the southern boundary of the plat at such point, the side lines of the lots not being joined on the plat nor extended to the meander line, the plat making no reference to the river, the plat does not extend to the meander line, and streets dedicated do not extend beyond the abutting lots as shown by the stakes and official plat.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 12, 1906, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

R. E. Taggart and Ben Sheeks, for appellant.

John C. Hogan, for respondents.

RUDKIN, J.—On the 10th day of October, 1866, the United States, by letters patent, granted to Samuel Benn lots 3 and 4, and the west $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 9, Tp. 17, N. R. 9 west, W. M., in Chehalis county, Washington Territory. The lands thus granted are situated on the northerly bank of the Chehalis river. Benn and wife continued to own the property until the 16th day of February, 1884, on which date they prepared, executed, and filed a plat of a portion thereof, known as Samuel Benn's Plat of Aberdeen. Between the time the government surveys were extended so as to include these lands and the time of filing the last-mentioned plat, the northerly bank of the river had washed away to

¹Reported in 87 Pac. 73.

such an extent that the government meander line extended from thirty to forty feet below the grass line or river bank proper, and below the line of ordinary high tide. When the survey for the plat was made the surveyor, by direction of the owners, placed the stakes marking the southerly boundary of the plat and the fractional lots bordering on the river, at the edge of the grass line, or on the bank of the river as it then existed, and the plat as filed shows the length of the side lines of each fractional lot from River street, which is substantially parallel to the river, but the side lines of the lots are not joined on the river front. H street as shown on this plat intersects River street at right angles and extends to the southerly boundary of the plat on the river front, wherever that may be ascertained to be. Lot 6 of block 52 lies on the easterly side of H street, and on the southerly side of River street. The east line of the lot as shown by the plat is fifty-one feet in length, and the west line fronting on H street fifty feet in length. Lot one of block 53 lies to the westerly side of H street, and to the southerly side of River street. The east line of the lot fronting on H street as shown by the plat is forty-nine feet in length and the west line thirty-seven feet. As stated above, the side lines of the lots in question are not joined on the river front. In the year 1905 Benn and wife conveyed to the plaintiffs in this action a strip of land lying between the southerly boundary of this plat and the government meander line. If H street should extend to the meander line, the strip of land claimed by the plaintiffs lies within the street, but if the street does not extend beyond the southerly boundary of the adjacent lots as indicated on the plat, the title of the plaintiffs is complete. This action was brought by the plaintiffs against the city of Aberdeen to quiet their title to the strip of land last described. The court gave judgment according to the prayer of the complaint, and from that judgment the city appeals.

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It is not contended that there was any dedication of H street beyond the confines of the plat, and if the street terminates at the southernmost point of the adjacent lots abutting thereon, as indicated by the official plat, the judgment is correct and must be affirmed. If on the other hand, the plat and the lots abutting on H street extend back to the government meander line, notwithstanding the survey and the plat to the contrary, it is only reasonable to hold that the street likewise extends to the meander line, and the judgment should be reversed. Samuel Benn was called as a witness on the part of the respondents and testified that a considerable portion of the river bank above the meander line had been washed away at the time he filed his plat; that he was in doubt as to the validity of his title below the line of ordinary high tide, and for that reason did not extend the plat beyond the bank of the river as it existed at the time the plat was filed. It was further shown that the parties who filed the plat conveyed the lots bordering on the river front shortly thereafter, and in every instance conveyed the strip of land lying between the lots, as indicated on the plat and the meander line, by separate instrument or description. This testimony was objected to as incompetent and immaterial. The testimony was perhaps competent for the purpose of showing the intention of the parties in filing the plat and the contemporaneous construction they placed upon it, but this question we do not deem it necessary to decide. No doubt where land is conveyed described as bounded by, or upon, or as running to, or along the sea or shore or bank of a river or stream, the grant carries the entire estate of the grantor, whether limited by high or low water mark, or by the thread of the stream; but that rule has no application in this case. The lots are particularly described on the plat and the plat itself makes no reference to the river. Of course the plat and the extrinsic evidence disclose the fact that the river flows in close proximity to the platted land, but there is

nothing to indicate that the river was, or was intended to be, the boundary line of the plat or lots. The lots on the river front abutting on H street were staked out on the ground, as extending back forty-nine and fifty feet respectively from River street, and were so indicated on the plat filed. If we must go back by construction thirty-five or forty feet farther to the meander line, simply because the parties filing the plat had title to that point, there is no reason why we should not extend them still farther across the adjacent tide lands, if the parties filing the plat had title thereto.

We are satisfied that the plat and the streets indicated thereon do not extend beyond the stakes placed along the river bank as indicated on the official plat, and the judgment is accordingly affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5551. Decided October 19, 1906.]

MARY A. GAFFNEY, *Respondent*, v. RICHARD SAXE JONES, *Appellant*.¹

JUDGMENTS—REVIVOR—STATUTES—CHANGE OF REMEDY. The legislature has power to reduce the time within which a proceeding may be commenced to revive an existing judgment, provided the right is not thereby arbitrarily and summarily cut off; since the same pertains only to the remedy and does not affect vested rights.

Appeal from an order of the superior court for King county, Hatch, J., entered December 7, 1904, upon findings in favor of the plaintiff, after a hearing on the merits, reviving a judgment. Reversed.

Ernest B. Herald, for appellant.

Joseph M. Glasgow, for respondent.

¹Reported in 87 Pac. 114.

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ON REHEARING.

Root, J.—After an opinion was handed down in this case (August 15, 1905; 39 Wash. 587, 81 Pac. 1058), respondent interposed an elaborate and able petition and argument for rehearing, based principally upon the contention that the statute of 1897, as applied to a case of this character, constituted the taking of property without due process of law. This point was suggested in the original briefs, but not urged or argued. A rehearing was ordered and the parties invited to file briefs presenting such arguments as they deemed proper, and were especially requested to give their views on the following questions: (1) Is this a proceeding to revive the judgment of the superior court or of the supreme court? (2) If this is an action to revive a judgment of the supreme court, how does the question of the constitutionality of the statute of 1897 become material, said statute having come into effect prior to the entry of the judgment? (3) If it is the superior court judgment that is sought to be revived, was the original proceeding (to revive) commenced in time? (4) Does the statute forbidding a revivor of a judgment on tort amount to the taking or damaging of property within the constitutional meaning? (5) Is a right of action upon a tort, before merged in a judgment, a property right which the legislature could not legally affect by means of a statute forbidding the revivor of judgments, as was done or attempted to be done by the statute of 1897? The pertinency of the foregoing questions will be perceived from the following statement of facts:

The judgment of the superior court in this case was entered on the 26th day of February, 1897. The statute involved in this case went into effect in June, 1897. An appeal was taken from the judgment of the superior court to the supreme court of the state, which handed down an opinion on December 17, 1897, affirming the judgment of the lower court. 18 Wash. 311, 51 Pac. 461. Judgment in the supreme

court was entered on the 21st day of January, 1898. The statute under which respondent sought to revive the former judgment requires the proceeding to revive to be commenced within six years from the date of entry of said judgment. It will be thus seen that, if the six-year period commenced to run on the date of the entry of the judgment in the superior court, February 26, 1897, more than six years had expired when this proceeding to revive was commenced on January 19, 1904. On the other hand, if it were the judgment of the supreme court that was sought to be revived, this judgment was entered January 21, 1898—some seven months after the act of 1897 had gone into effect, and consequently the latter could not be held to have had any retroactive effect. Respondent contends that it was the judgment of the superior court that was sought to be revived, and that the appeal to the supreme court tolled the running of the statute until the judgment of the latter court was entered, and that the six-year period (within which a revivor proceeding could be commenced) did not begin to run until the entry of the judgment of the supreme court on January 21, 1898. The act of 1897, which respondent claims to be unconstitutional as applied to a judgment of the character involved here, is set forth in our former opinion, 39 Wash. 587, 81 Pac. 1058.

Appellant urges that said statute is valid; that the taking away of the right to a revivor has to do only with the remedy, and that inasmuch as in this particular case the respondent had over six years within which to issue execution and enforce her judgment, the statute is, as applied to this case, in no sense obnoxious to the constitution. We think this conclusion must be sustained. The question as to how much time shall be given to a litigant to enforce a judgment which he has obtained in a court seems to us to be a matter of public policy to which the legislature may give expression by means of a statute, providing the right which the judgment evidences at the time of its entry is not arbitrarily

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and summarily cut off. Where, as in this case, a judgment creditor is given over six years within which to enforce her judgment, it would seem impossible to say that her rights under said judgment were summarily or arbitrarily terminated. We think the authorities bear out the view here expressed.

An interesting case is that of *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936. Certain persons, under the provisions of a state statute providing therefor, obtained judgments against the city of New Orleans for damages to property caused by mob violence. While these judgments remained in full force and unpaid and unsatisfied, the people of the state adopted a constitution which had the effect of preventing the city from levying a sufficient tax to pay said judgments or any portion thereof. It was contended before the supreme court of the United States that said state constitution impaired the obligation of contracts and amounted to a deprivation of property without due process of law. The court held otherwise, and while it expressly disclaimed any intention to pass upon the question of the effect of legislation upon the means of enforcing an ordinary judgment for tort, yet the principles involved would seem necessarily to apply to some extent, at least, to such cases. Mr. Justice Bradley, however, entertained and expressed a different view in an opinion concurring specially with the decision of the majority. As bearing upon the case at bar we may quote from his opinion the following:

"To abrogate the remedy for enforcing it [ordinary judgment for tort] and to give *no other adequate* remedy in its stead, is to deprive the owner of his property within the meaning of the Fourteenth Amendment."

It would seem to be implied and properly inferable from this language that such a statute or constitutional provision would be valid if some "other adequate" remedy were provided. We do not think this court can say, as a matter of

law, that six and a half years was an inadequate period to be allowed for the enforcement of respondent's judgment. In the case just cited there was an able dissenting opinion by Mr. Justice Harlan in which, among other things, he says that "the withdrawal of *all* remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is . . . to deprive the owner of his property." He makes no contention that such a statute would be unconstitutional if a reasonable time were allowed within which to enforce the judgment.

The case of *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193, involved the validity of a constitutional provision adopted by the people of West Virginia, providing that participants in the civil war should not be liable for, nor their property sold on account of, certain acts committed during the war. Prior to the adoption of said constitutional provision, Freeland had obtained a judgment against Williams for cattle driven off during the war. After the adoption of said provision, Williams began a proceeding in equity to enjoin the enforcement of said judgment, and obtained such a decree in the state courts. Freeland then sued out a writ of error, and the case was brought before the United States supreme court for review, the plaintiff in error urging that the state constitutional provision was in conflict with § 10, art. I, of the Federal constitution, in that it impaired the obligation of a contract, and with § 1 of the Fourteenth Amendment, in that it deprived him of property without due process of law. The court denied both contentions. Touching the latter, it said:

"The proposition of the plaintiff in error is, that by the judgment of the Circuit Court of Preston county he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the state which prevents his enforcing that judgment, in the modes which the law permitted at the time it was recovered, is depriving him of property without due process of law, and, therefore, for-

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bidden by the 14th amendment of the Federal constitution. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere. It is to be observed, in the first place, that the language of the prohibition against state interference with life, liberty or property, is that the deprivation of these precious rights shall not be had without due process of law. This phrase, 'due process of law,' has always been one requiring construction; and, as this court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due process of law and those which are not. Judgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties, have been subject to review, to reconsideration, to reversal and to modification by various modes. Among these are motions for new trials, appeals, writs of error and bills of review; and these have always been held to be due process of law. So, also, judgments of courts of law have been subject to be set aside, to be corrected and the execution of them enjoined, by bills in chancery, under circumstances appropriate to such relief. This also must be held to be due process of law. . . . Many other cases might be cited in which it was held that retrospective statutes, when not of a criminal character, though affecting the rights of parties in existence, are not forbidden by the constitution of the United States. We do not think that the supreme court of appeals of West Virginia, which seems to have carefully considered the question of due process of law in the case of *Peerce v. Kitzmiller* [19 W. Va. 564], and held that the statute of the state in carrying out the provisions of the constitution did not provide due process of law, was in error when it also held that the remedy provided by the constitution of the state as carried out by the ancient proceeding of a bill in a court of equity, was not void for want of due process of law, nor in conflict with the constitution of the United States."

In *Koshkonong v. Burton*, 104 U. S. 668, 26 L. Ed. 886, the United States supreme court among other things said:

"It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that

suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. . . . And if a proper construction of that act would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained. For this action was not instituted until more than eight years after the passage of the act of 1872. . . . There is no escape from this conclusion, unless we should hold that the legislature could not, constitutionally, reduce limitation from twenty to six years as to existing causes of action. But neither upon principle nor authority could that position be sustained."

The supreme court of Minnesota, in *Burwell v. Tullis*, 12 Minn. 572, spoke as follows:

"It would unquestionably be competent for the legislature to declare that a judgment creditor must attempt to enforce his judgment within a given time, or be afterwards denied any remedy for that purpose, and it must follow that if all remedy may be taken away, under similar circumstances, any particular remedy or a part of the remedy may also be taken away."

In the case of *Bartol v. Eckert*, 50 Ohio St. 31, 33 N. E. 294, the supreme court of Ohio, in discussing a statute as to revivor, said:

"It is well settled that a party to a suit has no vested right to an appeal or writ of error from one court to another. In *Lafferty v. Shinn*, 38 Ohio St. 46, it is stated that in the right to appeal to the courts there is not involved a further right to appeal from the judgment of the court to which such application for redress is made; on the contrary, that a right to appeal from such judgment exists only when given by statute; that such right to appeal, when so given, may be taken away by statute, even as to cases pending on appeal; and that the same thing is true with us as to proceedings in error. See *Com. v. Messenger*, 4 Mass. 469; *Ex parte McCardle*, 7 Wall. 506; *The Marinda v. Dowlin*, 4 Ohio St. 500; *Railroad Co. v. Grant*, 98 U. S. 398. We

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see no satisfactory reason why a different rule should be applied to the revivor of a dormant judgment, the recovery of which implies that there has been a previous recourse to the courts, and that due process of law has been invoked. In fact, after the act of 1876 took effect, the plaintiff had over seven years within which to institute proceedings to revive the dormant judgment. . . . But the limitation in the statute did not go to the merits of the action,—to the establishment of a contested right,—but to a remedy for the enforcement of a right already established. When an alleged conflict between a statute and the constitution is not clear, the implication must always exist that no violation was intended by the legislature.”

See, also, *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *Terry v. Anderson*, 95 U. S. 634, 24 L. Ed. 367; *Cohen v. Wright*, 22 Cal. 293; *Judkins v. Taffe*, 21 Ore. 89, 27 Pac. 221; *Swampland Dist. v. Glide*, 112 Cal. 85, 44 Pac. 451; *McCormick v. Alexander*, 2 Ohio 66; *Borrman v. Schoder*, 18 Wis. 437; *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Stine v. Bennett*, 13 Minn. 153; *Bagby v. Champ*, 83 Ky. 13; *Whitehead v. Latham*, 83 N. C. 232; Cooley, *Constitutional Limitations* (7th ed.), pp. 255, 515-524; 6 Am. & Eng. Ency. Law (2d ed.), p. 952. See, also, cases cited in former opinion.

The order appealed from is reversed, with instructions to the honorable superior court to dismiss the petition.

MOUNT, C. J., HADLEY, and CROW, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 6247. Decided October 18, 1906.]

PHIL T. BECHER, *Appellant*, v. HENRY A. SHAW *et al.*,
Respondents, and FRANK BENESH, *Garnishee*
Defendant.¹

EXEMPTIONS—HOMESTEADS—EXEMPTION OF PROCEEDS OF SALE. Under Bal. Code, §§ 5219 and 5247, authorizing the voluntary sale of an exempt homestead free from all claims or liens, and under a liberal construction of the exemption laws, the proceeds of such sale which the owner intends in good faith to reinvest in another homestead are exempt from garnishment.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered January 18, 1906, upon findings in favor of the defendants, dismissing a garnishment proceeding, after a trial upon the defendants' controversion of the answer of the garnishee. Affirmed.

A. E. Gallagher and *W. J. Thayer*, for appellant, contended, among other things: A voluntary sale of a homestead makes the proceeds of the sale liable to garnishment unless specifically protected by the statute. *Mann v. Kelsey*, 71 Tex. 609, 12 S. W. 43, 10 Am. St. 800; *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775; *Womack v. Stokes*, 12 Tex. Civ. App. 648, 35 S. W. 82; *Huskins v. Hanlon*, 72 Iowa 37, 33 N. W. 352; *Harrier v. Fassett*, 56 Iowa 264, 9 N. W. 217; *Giddens v. Williamson*, 65 Ala. 439; *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189; 1 Freeman, Executions (2d ed.), § 235; *Freiberg v. Walzen*, 85 Tex. 264, 20 S. W. 60, 34 Am. St. 808; 15 Am. & Eng. Ency. Law (2d ed.), 594; 18 Cyc. 1443; *Wright v. Westheimer*, 3 Idaho 232, 28 Pac. 430; *Bennett v. Hutson*, 33 Ark. 762; *Pool v. Reid*, 15 Ala. 326; *Connell v. Fisk*, 54 Vt. 381; *Salsbury v. Parsons*, 36 Hun 12; *Avery Planter Co. v. Cole*, 61 Ill. App. 494; *Reade v. Kerr*, 52 Ill. App. 467; *Scott v. Brigham*, 27 Vt. 561.

Belt & Powell, for respondents.

¹Reported in 87 Pac. 71.

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Opinion Per RUDKIN, J.

RUDKIN, J.—On the 27th day of March, 1903, the plaintiff commenced an action against the defendants Henry A. Shaw and wife for the recovery of the sum of \$296.90 with interest at the rate of six per cent per annum from January 24, 1903. At the time of the commencement of such action, a writ of garnishment was sued out and served on the garnishee defendant, Benesh. The garnishee answered that he was conditionally indebted to the defendants in the principal action in the sum of \$500, with interest at the rate of eight per cent per annum from June 2, 1902, on account of the balance due on the purchase price of certain real property purchased by the garnishee from the principal defendants, and in the further sum of \$24 on account of interest paid by the principal defendants on account of a certain mortgage on said real property, subject, however, to a counterclaim in the sum of \$137.50 in favor of the garnishee against the principal defendants. The principal defendants controverted the answer of the garnishee, alleging, among other things, that the money due from the garnishee to the principal defendants was a part of the purchase price of their homestead, and that they intended to invest the same in another homestead. Judgment was given in favor of the plaintiff in the principal action on the 10th day of October, 1904, in the sum of \$344.42, and \$16.60 costs of suit. At the hearing of the garnishment proceedings, the court found, that the defendants in the principal action had occupied the premises theretofore sold to the garnishee for a period of twenty years prior to the time of sale, and that they at all times claimed the same as their homestead;

“That on the 2nd day of June, 1902, said Henry A. Shaw and wife sold to the garnishee defendant Frank Benesh said premises for the sum of \$1,600; said premises being at that time mortgaged for the sum of \$600, which mortgage the said Benesh assumed and agreed to pay as a part of the purchase price; and that the money due from the said Benesh to said Shaw and wife is the proceeds of the sale of said

homestead, and that they at all times intended to purchase another homestead with said proceeds; and that the interest in said lands in said Henry A. Shaw and wife at the time of said sale is of the value of \$1,000."

As conclusions of law the court found that the proceeds of the sale of the homestead were exempt from garnishment, and entered judgment accordingly. From this judgment the plaintiff has appealed.

The case comes before us on the findings of the court below, and the sufficiency of these findings to sustain the judgment is the only question for consideration. The appellant contends that a voluntary sale of the homestead is a waiver of the homestead right, and that the exemption does not attach to or follow the proceeds of the sale. In support of this view he cites 15 Am. & Eng. Ency. Law (2d ed.), p. 594, as follows:

"In the absence of some provision in the statute to the contrary, the voluntary sale of his homestead by a debtor will constitute a waiver or abandonment of his right of homestead exemption, and the right will not follow and attach to the proceeds, but creditors may reach and subject them by garnishment or otherwise. In many states, however, the statute expressly or impliedly allows a debtor to sell his homestead for the purpose of investing in another homestead, and protects the proceeds prior to such reinvestment. In some states the proceeds are thus protected for a limited time only."

Exemptions are, no doubt, creatures of the constitution or the statute, and we accept the foregoing as a correct statement of the law. It only remains to consider whether our statute does, expressly or by implication, exempt the purchase price of the homestead from execution or garnishment, where the homestead claimant intended in good faith to reinvest the proceeds in another homestead. The statutory provisions bearing upon this question are the following: Bal. Code, § 5219 (P. C. § 5461), provides how the homestead may be conveyed or encumbered; section 5220 (P. C. § 5462), pro-

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vides how the homestead may be abandoned, viz., by declaration of abandonment or a grant thereof, executed and acknowledged; sections 5222 to 5232 (P. C. §§ 5464-5474), provide for a forced sale of the homestead where the value exceeds the statutory exemption; section 5233 (P. C. § 5475), provides that the amount of the homestead exemption must be paid to the claimant; and section 5234 (P. C. § 5476), that the money paid to the claimant is entitled to the same protection against legal process and the voluntary disposition of the husband as is the homestead itself. Section 5274 (P. C. § 840), provides as follows:

"In case of the sale of said homestead, any subsequent homestead acquired by the proceeds thereof shall also be exempt from attachment and execution; nor shall any judgment or other claim against the owner of such homestead be a lien against the same in the hands of a *bona fide* purchaser for a valuable consideration."

We are inclined to agree with the appellant that section 5233, *supra*, has no application to the proceeds of a voluntary sale, but we are nevertheless of opinion that sections 5219 and 5247, which authorize the sale of the homestead free from all claims or liens and the acquisition of a new homestead exempt from attachment or execution, by implication exempt the proceeds of the sale of the homestead from garnishment for a reasonable time where the homestead claimant intends in good faith to reinvest the proceeds in another homestead. We think that a liberal construction of the statute requires us to so hold, and that any other construction would in a measure defeat the beneficent purpose the legislature had in view. Of what avail would it be to the homestead claimant to sell his homestead free from claims and liens if the proceeds are to become immediately subject to execution or garnishment. If the claimant may exchange one homestead for another without forfeiting his exemption rights, why should he not be permitted to accomplish the

same result through the medium of a sale? In *Watkins v. Blatschinski*, 40 Wis. 347, the court said:

"The statute further provides that no judgment or decree against the owner shall be a lien upon the homestead for any purpose whatever, except in certain specified cases, which need not be noticed. The policy of the statute cannot be misapprehended. Its obvious design and plain purpose is, to benefit the debtor by securing to him his homestead beyond all liability to forced sale on execution or other process. In case the debtor desires to remove from the homestead for some temporary cause, or to absent himself for a time, the statute permits him to do so (*Jarvais v. Moe*, 38 Wis. 440); and the statute further enables him to sell and convey the homestead to a purchaser, free from all liens by judgment. It is obvious that this legislation is in the interest of the owner of the homestead, and was intended to confer valuable rights. It is not legislation for the benefit of creditors. Now, is it not plain that the right to sell and convey the homestead free from judgment liens is a barren right, so far as the owner is concerned, if the proceeds of the sale cannot be protected until they reach the hands of the vendor, or while in transition from one homestead sold to another purchased? It certainly seems to us to be a valueless right, if the proceeds of the sale are liable to be attached, or are subject to garnishee process, as soon as the homestead is sold. And we hardly think the legislature would have been to the trouble of enacting that the homestead might be sold and conveyed free from all judgment liens, if the right existed in the judgment creditor at once to attach all securities or garnishee all moneys arising from the sale. Consequently we must hold the intent of the law to be, to exempt the proceeds of the homestead, which the debtor *bona fide* intends to use and apply in obtaining another homestead. . . . This undoubtedly is the policy and spirit of the statute, to allow a person to sell one homestead and buy another; and the exemption must cover the change, and protect the proceeds while the transfer is being made. Otherwise the beneficent object of the law would often be defeated, and the owner would derive no possible benefit from the provision which enables him to sell and convey his homestead free from all judgment liens except those specified."

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This decision was prior to the Wisconsin statute exempting the proceeds of the sale of the homestead for the period of two years. See, also, *Cullen v. Harris*, 111 Mich. 20, 69 N. W. 78, 66 Am. St. 380.

The statute of Iowa authorizes a change in the homestead and provides that the new homestead shall be exempt to the extent of the value of the old, but does not in terms exempt the purchase money arising from the sale of the homestead. Nevertheless the supreme court of that state has repeatedly held that, where a party sells his homestead with the intention of purchasing another, he will be allowed a sufficient time within which to exercise that right, and during such period the proceeds of the sale are exempt. In *State v. Geddis*, 44 Iowa 537, the court said:

"Sec. 2000 of the Code provides that, 'The owner may from time to time change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or may change it entirely. . . .'
Sec. 2001. 'The new homestead to the extent in value of the old, is exempt from execution in all cases when the old or former homestead would have been exempt, but in no other, nor in any greater degree.' Here is an absolute right given to change one homestead for another, or to sell the homestead and acquire a new one, which shall be exempt to the same extent as the former one. There is no prescribed method as to how this shall be done. The statute does not provide that the sale must be for money in hand, which must be immediately invested in the new homestead; that is, that the selling of the old and purchasing of the new must be simultaneous acts. We must give the statute a reasonable construction so as to effectuate its object. If a homestead be sold and the proceeds applied to some other use there is no doubt that the exemption would cease, but where the sale is made on a credit and with the intention of using the proceeds when collected in purchasing another homestead, and the proceeds are not put to any intervening use, they are exempt while thus *in transitu*, so to speak, from the old homestead to the new. Any other rule would practically prohibit the changing of homesteads."

See, also, *Schuttloffel v. Collins*, 98 Iowa 576, 67 N. W. 397, 60 Am. St. 216, and cases cited. We are not unmindful of the fact that there are numerous decisions to the contrary of the views here expressed, but as said by the court in *Watkins v. Blatschinski*, *supra*, 'they are mostly from states where the courts place a strict construction on exemption laws, whereas, this court has uniformly declared that such laws must be liberally construed.

Finding no error in the record, the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 6128. Decided October 19, 1906.]

MARY M. MILLER, *Plaintiff and Appellant*, v. JAMES O'LEARY, *Defendant and Appellant*.¹

ADVERSE POSSESSION—CLAIM OF RIGHT—ACTUAL POSSESSION—EVIDENCE—SUFFICIENCY. There is not sufficient evidence of actual possession, under claim of right, to the north ten feet of a lot included in a plat by the mistake of an adjoining owner, where it appears that the grantee of the lot, in erecting buildings, abandoned work on the strip in dispute and occupied it only with a sidewalk used as an approach to buildings on the balance of the lot, that he paid taxes only on a fractional part of the lot, and the strip was used extensively by the public as a highway.

SAME—CONSTRUCTION OF SIDEWALK. The construction and use of a sidewalk across a ten-foot strip of a lot is not such a taking of possession of the entire strip as to give title by adverse possession.

SAME—PAYMENT OF TAXES—GOOD FAITH. Where the grantor had no title to the north ten feet of a sixty-foot lot, the payment by his grantee of taxes for seven years upon all but the north six feet of the lot, appears to have been made through mistake, rather than under claim and color of title made in good faith to four feet of the ten-foot strip, as required by Bal. Code, §§ 5503, 5504, to gain title to vacant land by the payment of taxes.

¹Reported in 87 Pac. 113.

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Citations of Counsel.

Cross-appeals from a judgment of the superior court for King county, Morris, J., entered November 17, 1905, upon findings in favor of the plaintiff for possession, but in favor of the defendant on plaintiff's claim for rent, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

Blaine, Tucker & Hyland (F. R. Conway, of counsel), for plaintiff. The possession must be adverse and continuous for the statutory period. 1 Cyc. 1008; *Brown v. Hanauer*, 48 Ark. 277, 3 S. W. 27; *Tegarden v. Carpenter*, 36 Miss. 404; *Holdfast v. Shepard*, 28 N. C. 361; *Atkinson v. Smith* (Va.), 24 S. E. 901; *Yelverton v. Hilliard*, 38 Mich. 355; 1 Am. & Eng. Ency. Law (2d ed.), 834; *Casey v. Inloes*, 1 Gill (Md.) 430, 39 Am. Dec. 658; *McEntire v. Brown*, 28 Ind. 347; *Core v. Faupel*, 24 W. Va. 238; *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 241; *Lohse v. Burch*, 42 Wash. 156, 84 Pac. 722.

Harold Preston and *Fred H. Peterson*, for defendant, contended, *inter alia*, that plaintiff's entry subsequent to the completion of defendant's ten-year adverse possession could not impair defendant's title. *Kline v. Stein*, 30 Wash. 189, 70 Pac. 235; *Thornley v. Andrews*, 40 Wash. 580, 82 Pac. 899; *Joy v. Stump*, 14 Ore. 361, 12 Pac. 929; *Parker v. Mezgar*, 12 Ore. 407, 7 Pac. 518; Hill's Code of Oregon, § 4; *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441; *Sherman v. Kane*, 86 N. Y. 57; New York Code of Proc., § 365; *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205; *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722; *Southern Pac. R. Co. v. Whitaker*, 109 Cal. 268, 41 Pac. 1083; California, Deering's Code of Civil Proc., § 318; *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; 2 Minnesota Statutes, ch. 66, § 4; *Allen v. Mansfield*, 82 Mo. 688; *Franklin v. Cunningham*, 187 Mo. 184, 86 S. W. 79; 2 Missouri Rev. Stat. 1889, § 6764; *Cervena v. Thurston*, 59 Neb. 343, 80 N. W. 1048; *Heinrichs v. Terrell*, 65 Iowa 25, 21 N. W. 171; *Doe v. Roe*, 13 Fla.

602; Florida Revised Statutes, 1892, §§ 1287-8; *Brackett v. Persons*, 53 Me. 228; *School District v. Benson*, 31 Me. 381, 52 Am. Dec. 618; Maine Revised Statutes, 1903, p. 857, § 1; *Casey v. Anderson*, 17 Mont. 167, 42 Pac. 761; Montana Comp. Statutes, 1887, § 29; *McMillan v. Wehle*, 55 Wis. 685, 13 N. W. 694; *Hatch v. Lusignan*, 117 Wis. 428, 94 N. W. 332; Sanborn & Ber. Ann. Stat., § 4207; *Clinton v. Franklin*, 119 Ky. 143, 83 S. W. 142; *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. 399, 28 L. Ed. 962. The acts of defendant constituted adverse possession. 1 Cyc. 983; *Goodson v. Brothers*, 111 Ala. 589, 20 South. 443; *Latta v. Clifford*, 47 Fed. 614; *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30; *Flint v. Long*, 12 Wash. 342, 41 Pac. 49; *Wishart v. McKnight*, 184 Mass. 283, 68 N. E. 237; *Giles v. Ortman*, 11 Kan. 59; *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170; *Fuller v. Elizabeth City*, 118 N. C. 25, 23 S. E. 922; *Hamilton v. Icard*, 117 N. C. 476, 23 S. E. 354; *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295; *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61; *Clark v. Gilbert*, 39 Conn. 94; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137; 1 Cyc. 999; *Skipwith v. Martin*, 50 Ark. 141, 6 S. W. 514; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Parker v. Newberry*, 83 Tex. 428, 18 S. W. 815; *Beaumont Pasture Co. v. Polk* (Tex. Civ. App.), 55 S. W. 614; *Converse v. Ringer*, 6 Tex. Civ. App. 51, 24 S. W. 705; *Hayes v. Martin*, 45 Cal. 559; *Lord v. Sawyer*, 57 Cal. 65; *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199. User by the public as a highway worked no interruption of defendant's adverse possession. *Burrows v. Gallup*, 32 Conn. 493, 87 Am. Dec. 186; *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Parker v. Newberry*, 83 Texas 428, 18 S. W. 815; *Skipwith v. Martin*, 50 Ark. 141, 6 S. W. 514; *Batchelder v. Robbins*, 95 Me. 59, 49 Atl. 210; *Irwin v. Dixon*, 9 Howard 10, 13 L. Ed. 25; *Columbia etc. R. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670. Where one enters land under color of title his actual possession of a part of the tract is held in law to be coextensive with the grant to him. *Puryear*

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v. Friery, 16 Tex. Civ. App. 316, 40 S. W. 466; *Peden v. Crenshaw* (Tex. Civ. App.), 81 S. W. 369; *Clarke v. Courtney*, 5 Peters 319, 8 L. Ed. 140; *Hopkins v. Robinson*, 3 Watts 205; *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709; *McMillan v. Wehle*, 55 Wis. 685, 13 N. W. 694; *Barber v. Robinson*, 82 Minn. 112, 84 N. W. 732; *Upper v. Lowell*, 7 Wash. 460, 35 Pac. 363; *Smith v. Gale*, 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521; *Richardson v. Watts*, 94 Me. 476, 48 Atl. 180.

PER CURIAM.—Mary M. Miller, plaintiff below, brought this action against James O'Leary, defendant, to recover the possession of a tract of land situate in the city of Seattle and described as the north ten feet of lot 6 in block 30, of David S. Maynard's plat of the town of Seattle.

From the record it is made to appear that, sometime prior to 1853, Henry L. Yesler and David S. Maynard severally settled upon and located, under the Oregon Donation Act, land claims on what is now the city of Seattle. The claims adjoined each other, the south line of Yesler's claim forming the north boundary of Maynard's. In 1853 Maynard filed the town plat above mentioned, evidently believing that the land included therein lay wholly within his own donation claim; but in this he was mistaken, as it actually extended over into Yesler's claim a distance of 130 feet. Block 30 was so platted that the north ten feet of lot 6 therein, the tract in dispute, lay within the Yesler claim. Maynard, although he never acquired title to this ten-foot strip, conveyed the same, not long after he filed the plat, to one James Tilton, and from him the land passed through regular mesne conveyances to the defendant, who acquired it in June 25, 1896, his immediate grantor being one Daniel O'Leary. The plaintiff has title from Yesler, having purchased the property from the executor of his estate. To maintain her action the plaintiff relied upon the conveyance from the executor of Yesler's estate to herself. The defendant concedes that

Maynard had no title to the land when he conveyed to Tilton, and that none passed to him by virtue of the several conveyances from the grantees of Tilton, but he contends that he has title by virtue of the general statute of limitations relating to adverse possession, and the special statute relating to the payment of taxes for seven consecutive years. The case was tried before the court sitting without a jury, and resulted in findings and a judgment in favor of the plaintiff for the recovery of the land. Both parties appeal, the plaintiff, from the refusal of the court to award her judgment for rents, and the defendant, from the judgment as entered.

With reference to the claim of adverse possession, it appears that in 1889 Daniel O'Leary, who then held the paper title, leased the whole of lot six to a Chinaman called Quong Chong, for a term of five years, granting him permission to erect certain buildings upon the lot. At the time the lease was executed O'Leary claimed the whole of the lot, and pointed out its boundaries to Quong as the property leased. The lessee graded the lot immediately after the execution of the lease, and before the beginning of the year 1890, erected a Joss house on the northwest corner of the lot immediately south of the strip, at the same time building a walk on the north side of the house along the strip back for a distance of about sixty feet, which was used as an entrance way to the rear door of the Joss house, and to certain other buildings that were afterwards erected on the lot. This walk seems to have been maintained by the defendant's tenants from that time until shortly before the active dispute between the plaintiff and defendant began, perhaps about the year 1901.

With the exception of the payment of taxes to be mentioned later, these are, in substance, the only overt acts of adverse possession shown. Whether such acts, if they stood alone, would justify the court in saying that the legal title had

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been diverted from the plaintiff to the defendant we think might reasonably be questioned, but other facts shown, it seems to us, scarcely leaves the case in doubt. The most potent of these is the fact that no permanent structure in the way of a building was put upon the strip. Although the tenants of the defendant's grantor studded the remaining portion of the lot with a variety of buildings, even to the very margin of the disputed ground, yet scrupulous care was observed not to extend them onto it. It hardly seems possible that, had the defendant's grantor contended in good faith as early as 1899 that the disputed tract passed by the deed from Maynard, or that he otherwise had claim to it, he would not have covered it with buildings. One of the plaintiff's witnesses, moreover, testified that the Chinese lessee did start to erect the Joss house near the north line of the lot as platted, going so far as to level off the ground and commence the foundation, but shortly afterwards, at the solicitation of some one, moved it south until it was off the disputed strip.

Another fact shown by the record that seems to us to controvert the defendant's claim is that the tract remained open to the public and was extensively used by the public as a highway during the entire time the defendant now claims to have had adverse possession of it. Had the space been needed as a highway for the use of the defendant's tenants, the case might have been different, but such was not the fact. The lot was accessible from both sides; and certainly this space covered with buildings would have been made more serviceable and profitable to its owners than it was while in use as a mere alleyway. Still another fact is that lot six was not given in to the assessor for taxation as an entire lot during any part of that period. For the purposes of taxation it was divided into tracts called the south fifty-four feet, and the north six feet, and different parties paid the taxes upon it in these proportions. When it is remembered that, in the earlier of the years mentioned, ownership of real

property for the purposes of taxation was ascertained from persons claiming it rather than from any systematic study of the records, it is at least significant that none of the defendant's grantors thought to have the entire lot assessed under his own name. What gave rise to the arbitrary division made, the record does not make very clear, but it can be surmised that the defendant's grantors intended to pay only on that part of the lot to which they had title, and were in error as to the size of the strip in dispute.

The contention that the construction of the sidewalk was a taking of possession of the entire tract obviously has no merit. Its construction and open and continuous use for the period of the statute of limitations might give rise to an easement in the nature of a right of way over that portion of the lot so used, but to use a portion of a tract as a right of way is clearly not an adverse user of the entire tract.

The claim that the defendant has title by virtue of the seven-year statute has no better foundation. On the north six feet, no continuous payment of taxes for that period of time was in fact made, and the claim to that part of the tract can be dismissed at once. While taxes on the south four feet have been paid for the period required, we think the payments were not made under the conditions the statute imposes. The statute requires the taxes to be paid under "claim and color of title" when the land is in possession of the person paying the taxes, and under "color of title made in good faith" when the land is vacant and unoccupied. Bal. Code, §§ 5503, 5504 (P. C. §§ 1160, 1161). Here, as we have said, the evidence convinces us that the defendant made no claim to this ten-foot strip, or any part of it, and that his payment of taxes on a portion of it was made through error rather than with any intent to pay taxes on it. Such a payment can neither be under claim and color of title, or under color of title made in good faith. The payment might, under rules elsewhere announced by this court, give rise to the right to

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recover of the true owner the taxes so paid, but we think it cannot give title to the land itself.

On the plaintiff's appeal, we do not think the equities of the case justify a recovery of rents or damages, and we decline to disturb the judgment in this respect.

The judgment appealed from will therefore stand affirmed, neither party to recover costs.

[No. 6103. Decided October 19, 1906.]

ORVILLE McALLISTER, *an Infant, by His Guardian ad Litem*,
LAVICA McALLISTER, *Appellant*, v. SEATTLE
BREWING & MALTING COMPANY,
Respondent.¹

NEW TRIAL—EXTENDING TIME FOR APPLICATION—POWER OF COURT—EFFECT OF STATUTE. The statute requiring a judgment to be entered immediately upon return of the verdict, does not change the rule, under the former statute, whereby the court had power to extend the time for moving for a new trial after the time therefor had expired.

NEGLIGENCE—EXPOSED MACHINERY—INJURY TO TRESPASSING CHILDREN. The owner of premises is liable for injuries to trespassing children, sustained by reason of dangerous machinery left unguarded in exposed places near a highway where children are likely to be attracted thereto and injured.

SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. The liability of the owner of premises to a trespassing child nine years of age, is for the jury where a pulley or sheave wheel, used to move cars on a spur track with a wire cable and donkey engine, was left exposed and unguarded on defendant's premises (which had been a public street) within twenty-five feet of paths commonly used by the public, and where the child was attracted by the moving cable, and injured by placing his foot on the slowly moving cable, which suddenly started up rapidly, drawing his foot against the pulley.

Appeal from an order of the superior court for King county, Morris, J., entered January 5, 1906, in favor of the defendant, granting a new trial, after a verdict in favor of

¹Reported in 87 Pac. 68.

a child of tender years, for personal injuries sustained through the use of an exposed pulley wheel near a public street. Reversed.

John W. Roberts, for appellant.

C. A. Reynolds (*Wm. H. Brinker*, of counsel), for respondent.

FULLERTON, J.—The appellant, a minor of the age of nine years, lost two of his toes on a pulley or sheave wheel operated by the respondent, a brewing company, and brought this action to recover for the injury suffered. The pulley in question was placed in the center of one of the spur tracks of the Northern Pacific Railway Company, and was used by the respondent in connection with a wire cable and donkey engine to move cars up and down the track for the more convenient operation of its brewing plant. The brewing plant of the respondent is situated at Georgetown, in King county, just east of the main tracks of the railway company, which run parallel with and immediately in front of the plant. There is a street in Georgetown called Nora Avenue which runs at right angles to the railway tracks, crossing them just south of the brewery company's plant. This street had never been condemned across the railway company's right of way, and all that part lying east of the track had been vacated by ordinance of the town council sometime prior to the accident, the vacated portion becoming thereby the private property of the respondent. The street, however, was not closed to travel, and at the time of the accident was used by a considerable number of the people who found it the most convenient means of passing to and from their own property and the business section of the town. The street had never been improved, and travel over it took the most convenient way. Where the street abutted on the railway right of way there was an embankment of considerable height, to avoid which the travel turned, one track going next to the

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brewing company's property and the other some distance the other way, neither passing any nearer than perhaps twenty-five feet of the center of the street where it crossed the right of way. The sheave wheel in question was placed in the center of the street on the railway company's right of way, where these tracks diverged, having been placed there by the respondent with the railway company's permission. It had no covering or protection of any kind, and was used at all times of the day that the business of the respondent required its use. While motionless the pulley was harmless, but when in motion it had all the dangers incident to machinery of its class.

Just prior to the accident, the minor appellant, in company with another boy of about his own age, while passing over the railway track on the path next the respondent's property, was attracted to the wheel and went over to examine it. The boys do not agree in their testimony as to the conditions immediately preceding the accident; but the boy who accompanied the appellant seems to have the clearer idea of what happened. He testifies that the cable was being drawn slowly through the pulley when they reached it, and that the appellant put his foot on, when it started up rapidly, drawing his foot between the cable and the pulley, with the result above stated.

The trial judge first submitted the case to the jury, which returned a verdict for the appellant. Afterwards he granted a motion for a new trial on the ground that the evidence, as a matter of law, did not justify a verdict. This appeal is from the order granting the new trial.

The motion for a new trial was not filed before it was served on the appellant, and a motion was made in the court below to strike it for that reason. The respondent, in answer to the motion, asked, and over the objection of the appellant obtained, from the court an order extending the time within which to move for a new trial, and the motion for a

new trial on which the court acted was served pursuant to that order. The appellant urges here that the trial court was without power to make an order extending the time in which a motion for a new trial could be filed, and he insists that the order appealed from is erroneous for that reason. It is conceded that this court has, in a number of cases, approved the practice followed by the trial court, but it is contended that the recent statute which requires a judgment on a verdict to be entered immediately on the return of the verdict has changed the rule. But, without following the argument, we think that the statute cited did not have that effect. It does not purport to change the existing practice, and the reasoning by which the practice was justified under the earlier statute is equally applicable to the existing one. For cases where the reasons are stated, see: *Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631; *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107; *Kreielsheimer v. Nelson*, 31 Wash. 406, 72 Pac. 72.

Passing to the principal question, we think the court was in error in holding that the evidence introduced at the trial did not justify a verdict. There are jurisdictions in which it is maintained, as a hard and fast rule, that, if a child goes upon the premises of another without express permission and is there injured by coming in contact with dangerous machinery, it cannot recover damages from the owner, on the principle that such owner owes the child no active duty to see that it does not come to harm, but only the duty not to wantonly or willfully injure it. But this court has not adopted this rule in its entirety. Where the dangerous machinery is connected with an ordinary manufacturing plant, and so surrounded with the ordinary safeguards as to legitimately lead to the conclusion that children of immature years unattended will not approach it, the owner or operator owes no such duty of active vigilance to possible trespassing children as requires him to keep a guard over the premises; and hence he is not responsible if a child does approach and

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meet with injury from such machinery. Such is the principle of the case of *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955. There the machinery on which the child was injured was within an enclosure which was constructed at a considerable distance from any highway or any place where children were accustomed to play, and had no especial attractiveness, being machinery in common use and no more exposed than the manner of its use required; and we held, which must unquestionably be the rule, that the owner of such property owed no such duty to trespassing children as required him to so fence and guard his machinery as to render it impossible for them to receive an injury therefrom.

On the other hand, we have held that, where dangerous machinery and dangerous substances, of a character likely to excite the curiosity of children and allure them into danger, have been left unguarded in exposed places close to the highways, or play grounds of children, even though on the premises of the owner, and children have been attracted to them and met with injury, the owner or person leaving the dangerous machinery or substance is liable for such injury. Cases of this class are *Ilwaco etc. Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. 169, and *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 96 Am. St. 902. The first is a turntable case, and the second a case where dynamite had been left partially exposed on a vacant lot used by children as a play ground. The children injured in each case had no special license to be at the place where the injury occurred, nor did the owner of the articles or substance causing the injury owe to the children any special duty of protection or care. But the cases are rested on the principle that it is negligence in itself to leave, exposed and unguarded near the haunts of children, dangerous machinery or compounds which must necessarily result in injury to them if they come in contact with it. It matters not that the dangerous article may be on the premises of its owner, or that the injured person

must become technically a trespasser to approach it. It is enough that the thing is dangerous in itself, and is attractive and alluring to children, and has been left exposed and unguarded in a place where it must reasonably have been anticipated that children would be attracted to it, and tempted to play with and handle it. Between the two extremes represented by these divergent rules, there are, of course, a large class of cases which, from the facts or the deduction properly to be drawn from the facts, cannot certainly be said to fall within the one or the other. The question then, like all other disputed questions of fact, becomes one for the jury, to be determined for or against the plaintiff as the jury may believe the evidence warrants, after the court has instructed them in the law relating to the duties of the owners and operators of such property.

Applying these principles to the case before us, we think the court erred in adjudging that the facts shown by the evidence did not warrant a recovery. Whether the sheave wheel when in operation belonged to the class of dangerous machinery, whether it was of such an attractive or alluring character as to attract children, and whether it was placed and operated, without guards or protected, so close to a public highway that it must have been foreseen that it would attract and injure a child of such tender years as the plaintiff, were questions for the jury to determine from all of the evidence, and the court was right in submitting it to them in the first instance, but in error in afterwards holding that the question presented was of such a nature that it must be determined in favor of the defendant as a matter of law.

We conclude therefore that the order appealed from must be reversed, and the cause remanded with instructions to enter a judgment upon the verdict returned by the jury. It is so ordered.

MOUNT, C. J., RUDKIN, ROOT, DUNBAR, and CROW, JJ.,
concur.

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[No. 6323. Decided October 23, 1906.]

MARY JANE FROST *et al.*, Appellants, v. JAMES PERFIELD,
Respondent.¹

PRINCIPAL AND AGENT—AGENCY—BUYING IN DELINQUENT PROPERTY AT TAX SALE—REFUSAL TO CONVEY TO PRINCIPAL. A lessor and neighbor of the owner of property, who bids the same in at tax sale, acts as agent for the owner and is bound to reconvey upon tender of the taxes, where it appears that, after the owner's removal to Alaska, such lessor, who was delinquent in rent, upon the owner's request went to the county seat to investigate the taxes at different times, reported that they were delinquent, and later that the premises were about to be sold, and that he would attend the sale and bid in the property if the price was not too high, and that he bid in the property without notifying the owner that he was acting for himself.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered January 10, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to compel an agent to convey property bought at tax sale for the original owner. Reversed.

Boyle & Warburton, for appellants.

George T. Reid, for respondent.

Root, J.—In the year 1899 the appellant Mrs. Frost let a tract of land, owned by her and the other appellants, to the respondent, at a rental of \$20 per year. The respondent leased the property principally on account of a spring of water located near his adjoining hop field, the water to be used in spraying his hops. He paid the rent for the year 1899 and up to and including the year 1902. He paid no rent for the years 1903, 1904 and 1905. In 1900 appellant Mary Jane Frost and her son Roy and daughter Edith moved to Alaska, where they remained until July, 1905. In the latter part of the year 1903, Mrs. Frost wrote to respondent,

¹Reported in 87 Pac. 117.

requesting him to pay the taxes on said property, deducting the same from what he owed her if sufficient, and stating that, if the taxes exceeded the amount thus owing, to send her a bill for the balance, which she would repay. Shortly after receiving his letter, respondent went to the city of Tacoma and inquired about said taxes and was informed that the property had been sold to the county for delinquent taxes. He did not immediately answer appellant's letter. She again wrote him in the early part of 1904, making the same request, whereupon he again visited the county treasurer's office and learned that the property would be sold by the county soon thereafter. He then wrote to Mrs. Frost, telling her that the property would be advertised for sale and sold in the near future, and that he would attend the sale and bid in the property if it did not sell too high. Mrs. Frost claims that in his letter to her he stated that he would bid in the property for her. The respondent denies this. The letter which he wrote was not produced in evidence, the appellant Mrs. Frost stating that the same had been lost. The letters of Mrs. Frost to respondent were not introduced in evidence, the respondent claiming that said letters had been lost. The respondent attended the sale and bid in the land for \$460. Mrs. Frost returned from Alaska about July, 1905, and immediately called upon respondent to find out about her land. Respondent told her he had bought in the land for \$460, and that he would convey it to her if she would pay him \$650. She and her son testify that respondent stated that he ought to have the difference between \$460 and \$650 for his trouble, time, and money. Mrs. Frost claims that, at the first interview, respondent did not intimate that he had bought the land for himself. She saw him again soon thereafter, and tendered the money he first demanded, and asked for a deed. On his refusal to execute and deliver such deed, this action was brought. Trial was had by the court without a jury, and findings and conclusions

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made and entered in favor of respondent. From a judgment entered thereupon this appeal is taken.

We think the judgment must be reversed. It is urged by respondent that he did not promise to buy in this property for appellants, and that he was under no obligation to do so. It is very evident, however, from the evidence, that the appellants understood the letter which they received from respondent to mean that he would buy in the property as their agent. He was their tenant and had been their neighbor, and they had written to him to ascertain about the condition of the taxes upon this property. When he received that letter, it was optional with him whether he would comply with their request or not. He could have declined to do anything in the matter, or he could have written and told them to secure the services of some other person. Instead of doing this, he complied with the request to the extent of going to Tacoma and making inquiries at the county treasurer's office relative to these taxes. When he did this, he constituted himself the agent of appellants. Upon receiving the second letter, he again visited the treasurer's office and ascertained the condition of the property with relation to the taxes. When he wrote to Mrs. Frost and told her the condition in which he found the property, it was in answer to her letter requesting him to investigate the matter, and she had a right to suppose that he was acting not only at her request but in her behalf. In view of the relationship existing between the parties, and of all the circumstances, we think that he was not justified in buying in the property for himself without plainly informing the appellants of that intention. If Mrs. Frost's version of what respondent's letter contained is the true one, there could be no question of respondent's duty in the premises. But accepting the evidence of the respondent himself, to the effect that he stated that he was going to bid in the property if it did not go too high, we think such a statement under the circumstances of

the case, was well calculated to make appellants believe, and that they did believe, that respondent was intending to bid in the property as their agent, and for their benefit. If, when he wrote that letter, he intended to bid in the property for his own use and benefit, we think it was his duty to have so stated, plainly and unequivocally. He does not claim to have so done. Where a woman and her children rely upon a neighbor and tenant, whom they have intrusted to look after a matter in their behalf, under such circumstances as are here presented, they should not be compelled to suffer as victims of misplaced confidence unless the law or right of the matter clearly necessitates such punishment. Such is not the case here.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to enter a judgment and decree requiring the respondent to convey to appellants the property in question upon payment of the \$460 and subsequent taxes (if any) paid by respondent to the county, together with legal interest thereon from the date of said purchase to the time of the commencement of this action, less sixty dollars rent for years 1903, 1904, and 1905, with legal interest thereon.

MOUNT, C. J., CROW, HADLEY, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

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Citations of Counsel.

[No. 6258. Decided October 23, 1906.]

MADS PETERSON, *Appellant*, v. THEODORE STEINHOFF *et al.*,
Respondents.¹

COVENANTS—BREACH OF WARRANTY—JUDGMENTS—CONCLUSIVENESS—NOTICE TO DEFEND. Where a covenantor in a warranty deed was served with notice to appear and defend an action of ejectment, and failed to do so, a default judgment entered in the ejectment suit is not conclusive against the covenantor that his title was defective, unless the covenantee proves, or the record in ejectment affirmatively shows, that his title was in issue; and an action on the covenant is properly dismissed where the plaintiff failed to show that the judgment in ejectment was not rendered by reason of any act or default on his part.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 25, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury in an action for breach of warranty. Affirmed.

Merritt & Merritt, Millett & Harmon, and W. E. Southard, for appellant, to the point that the covenantor who is notified to appear and defend and does not do so is bound by the judgment of eviction, cited: *Cullity v. Dorffel*, 18 Wash. 212, 50 Pac. 932; 11 Cyc. 1104, and cases cited; *Ives v. Niles*, 5 Watts. 323; 8 Am. & Eng. Ency. Law (2d ed.), 206; *Jackson v. Marsh*, 5 Wend. 44; *Brown v. Hearon*, 66 Tex. 63, 17 S. W. 395; *Chamberlain v. Preble*, 11 Allen 370, and the authorities cited in the briefs in *Cullity v. Dorffel*, viz: 2 Warvelle, Vendors, p. 1006; Martindale, Conveyancing, § 170; Wade, Notice, p. 264; Rawle, Covenants, §§ 122-124; Devlin, Deeds, § 935; *Haines v. Fort*, 93 Ga. 24, 18 S. E. 994; *Maverick v. Routh*, 7 Tex. Civ. App. 669, 26 S. W. 1008; *Wheelock v. Overshiner*, 110 Mo. 100, 19 S. W. 640; *Brown v. Taylor*, 13 Vt. 631, 37 Am. Dec. 618; *Chicago v.*

¹Reported in 87 Pac. 118.

Robbins, 2 Black 418, 17 L. Ed. 298; *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186; *King v. Kerr's Adm'r*, 5 Ohio 154, 22 Am. Dec. 777; *Wendel v. North*, 24 Wis. 223; *McConnell v. Downs*, 48 Ill. 271; *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426.

Forney & Ponder, for respondents.

RUDKIN, J.—On the 26th day of April, 1902, the defendants Steinhoff and wife conveyed to the plaintiff Peterson lots 3, 4 and 5 of block 13 in the town of Almira, Lincoln county, Washington, by deed of general warranty, in consideration of the sum of \$1,250 to them in hand paid. In the month of March, 1904, A. W. Salisbury and wife commenced an action in the superior court of Lincoln county against the plaintiff Peterson for the recovery of the possession of said lots, and for a judgment quieting their title thereto. Immediately after the service of the summons in said last-mentioned action, the plaintiff Peterson served on the defendants Steinhoff and wife a written notice of the commencement of said action, requiring them to appear and defend the same upon the covenants of warranty contained in their deed. No appearance was entered in this action by either Peterson or the Steinhoffs, and on the 6th day of May, 1904, judgment was given by default, quieting the title to said lots in Salisbury and wife and awarding them the possession thereof. Thereupon this action was commenced to recover damages for breach of the covenants of warranty contained in the deed from the Steinhoffs to Peterson. The complaint alleged, and the plaintiff proved, the execution and delivery of the warranty deed from the defendants to the plaintiff; the payment of the purchase price; the commencement of the action by Salisbury and wife to recover possession of and quiet their title to the lots conveyed by the deed; a notice to the defendants herein to appear and

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defend on their covenants of warranty; and the default judgment. Upon this testimony the court found, among other things, "That the judgment of eviction aforesaid, was not rendered by reason of a superior title of the said A. W. Salisbury and wife not derived from the said Mads Peterson," and entered a judgment of dismissal. From this judgment the defendants appeal.

If the finding that the judgment of eviction was not rendered by reason of a paramount title in Salisbury and wife, not derived from the appellant, is sustained by the testimony; or rather is justified by the lack of testimony, no breach of the covenant of warranty is shown, and the judgment must be affirmed. The appellant relies upon the rule broadly stated by this court in *Cullity v. Dorffel*, 18 Wash. 122, 50 Pac. 932, as follows:

"The rule is well settled that a covenantor of title is bound by a judgment of eviction against the person to whom the covenant has run, where he has appeared and defended the action, or *where he was notified to do so*, and, in the absence of any showing of fraud or collusion the covenantor who has neglected *after notice* to defend will not be permitted to assert that the recovery was not obtained by virtue of a paramount title;"

and upon other like general statements of the rule contained in judicial decisions and text books. This general statement of the rule is correct if limited to the issues presented and tried in the ejectment suit. Where notice to defend has been given, the judgment in ejectment is, no doubt, conclusive of the question that the title of the plaintiff in ejectment was paramount to the title of the defendant in ejectment *at the time of the rendition of the judgment of eviction*, in the absence of fraud or collusion, and is also conclusive of the question that the title of the plaintiff in ejectment was paramount to the title of the covenantor at the time of his conveyance to the defendant in ejectment, if such title was in issue in the ejectment suit; but otherwise it manifestly is not.

Suppose the covenantee should give a deed of the property and refuse to surrender possession, or should give a mortgage and suffer a foreclosure, or should suffer the property to be sold for a tax or assessment which he was obligated to pay, could the covenantor defend against such claims, or would a judgment in ejectment be conclusive that the grantor's covenant of warranty was broken? Assuredly not. And the general rule above stated is only correct and only applicable when limited by the issues presented and tried in the ejectment suit. Thus in *Cullity v. Dorffel*, *supra*, the court cites, in support of its decision, Rawle on Covenants for Title, § 122. That section is as follows:

"So far as the plaintiff in his action on the covenant must, notwithstanding a notice given by him, affirmatively show by evidence *dehors* the record that the recovery against him was under a title not derived from himself, the question admits of easy solution. It has been seen that in a declaration for a breach of the covenant for quiet enjoyment it is necessary to allege not merely that the eviction was made under paramount title, but that such title was 'existing before and at the time of the conveyance to the plaintiff,' as the eviction might indeed be under a paramount title, but one which had been derived from the plaintiff himself, for which of course his covenantor would not be responsible."

In *Davenport v. Muir*, 3 J. J. Marshall (Ky.) 310, the court said:

"If the covenantor be notified of the pendency of the suit against his covenantee, the judgment against the latter is evidence against the former that the recovery was obtained by paramount title. If the notice be sufficient, the judgment will be conclusive, unless it had been obtained in consequence of some act which occurred after the date of the covenant."

"But where the covenantor has been notified of the pendency of such suit, or appeared, or was a party thereto, the record of such judgment is conclusive evidence of the paramount title of the adverse claimant, provided the covenantee proves, or the record shows affirmatively, that such judgment

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was not obtained through title derived from himself since the execution of the deed by the covenantor."

See, also, 8 Am. & Eng. Ency. Law (2d ed.), p. 203; Freeman, Judgments (4th ed.), § 187. While, therefore, a conclusive presumption attaches to the judgment of eviction in ejectment, where notice to the covenantor to defend has been given, in the absence of fraud or collusion, the judgment in the nature of things can be no evidence that the title of the covenantor was defective perhaps years before, unless that title was in issue; and unless the record in the ejectment suit shows that the title deraigned from the covenantor was in issue, it is incumbent on the plaintiff to show, in an action on the covenant, that the judgment in ejectment was not rendered by reason of any act or default of his own. Inasmuch as the appellant failed to prove a breach of the covenant of warranty, the judgment must be affirmed, and it is so ordered.

MOUNT, C. J., DUNBAR, CROW, HADLEY, and ROOT, JJ., concur.

[No. 6363. Decided October 24, 1906.]

LEE MANTLE, *Appellant*, v. JOSEPH B. DABNEY *et al.*,
Respondents.¹

MORTGAGES—DEED BY HUSBAND AND WIFE AS SECURITY—PAYMENT AND SUBSTITUTING NEW DEBT—CONSENT OF WIFE. Where a deed was executed by a husband and wife as security for a note, and the husband subsequently paid the note in full, but agreed that the deed should be held as security for another note then given by him, the deed was void as security for such note without some act equivalent to legal execution thereof by the wife for such purpose.

STATUTES—FOREIGN LAWS—PLEADING—PRESUMPTIONS. Where the statutes of a state are not pleaded they are presumed to be the same as the laws of this state.

¹Reported in 87 Pac. 122.

HUSBAND AND WIFE—LIABILITY OF WIFE FOR HUSBAND'S DEBTS—LAWS OF FOREIGN STATE—CONSTRUCTION. The laws of Montana requiring the wife to file an inventory of her separate property having been held by the supreme court of Montana to be repealed, and there being no community property system in Montana, the separate property of a wife, situated in this state, is not subject to liability upon the note of the husband executed in Montana, where the note was not given for the necessities mentioned in Montana Civil Code, § 227.

APPEAL—DECISION—OBJECTIONS—WAIVER. Where a defense of usury was waived at the trial, the supreme court cannot, upon appeal by plaintiff and a reversal, permit the defendants a new trial as to such defense.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered April 13, 1906, in favor of the defendants, after a trial on the merits before the court without a jury, in an action on a promissory note. Reversed in part and affirmed in part.

A. M. Abel and W. H. Abel, for appellant, contended, among other things, that the trust deed must be construed as a mortgage. *First Nat. Bank v. Bell etc. Min. Co.*, 8 Mont. 32, 19 Pac. 403; 2 Jones, Mortgages (4th ed.), § 1767; *Banta v. Wise*, 135 Cal. 277, 67 Pac. 129; 28 Am. & Eng. Ency. Law (2d ed.), 752. The payment *ipso facto* discharged the security. *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Mack v. Wetzlar*, 39 Cal. 247; *Willis v. Farley*, 24 Cal. 491. The payment operated to reinvest the mortgagor with title. 1 Jones, Mortgages (4th ed.), § 886; 2 Jones, Mortgages (4th ed.), § 1766; *Holman v. Bailey*, 3 Met. (Mass.) 55; *Stewart v. Crosby*, 50 Me. 130. The agreement was verbal and therefore violated the statute of frauds, whether the laws of Washington, of California, or of Montana, control. Bal. Code, § 4517; 2 Kerr's Cal. Code, § 2922; *Porter v. Muller*, 53 Cal. 677; 1 Mont. Code, p. 1155, § 2342. This court will

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assume that the California statute is like that of Washington. *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791; *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556.

John C. Hogan, for respondents, contended, *inter alia*, that the fact that the security has not been foreclosed is a complete defense to an action on a note made in Montana. Montana Code of Civil Procedure, § 1290; *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808; *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312; *Bartlett v. Cottle*, 63 Cal. 366; *Hibernia Sav. and Loan Society v. Thornton*, 123 Cal. 62, 55 Pac. 702.

Root, J.—This was an action by appellant upon a promissory note, made by the defendant Joseph B. Dabney, in the state of Montana. From a judgment for respondents, an appeal is prosecuted. The material facts involved are about as follows: On January 27, 1902, Joseph B. Dabney borrowed \$15,000 from Mantle and Hodgins, on his personal note, and, with his wife, executed a warranty deed for three hundred and fifty acres of land in California, which deed was delivered with the verbal understanding that it was to be held as security for the payment of said note. On July 28, 1902, Dabney paid said note in full, but at the same time purchased twenty-two thousand shares of oil stock, giving in payment thereof two promissory notes, one of which is the subject-matter of this action. At the time of this transaction, said Dabney agreed with Mantle and Hodgins that they should release one hundred and fifty acres of the land conveyed to them as aforesaid, and hold the balance as security for the payment of the two notes given for the oil stock.

Respondents, at the time of the commencement of this action, were residents of the state of California. The action was commenced by attachment of property belonging to them in this state. Respondents answered separately. One defense interposed was that of usury, which was, however,

withdrawn from the trial. The principal defense urged by respondent Joseph B. Dabney was that the statute of Montana, where and when the note was given, was, and ever since has been, that no action shall be maintained upon a promissory note other than one to enforce the same against the property by which it is secured, until such property has been subjected to the payment of said note. To this defense the appellant replies that this note was not secured. He maintains that, when the \$15,000 note was paid, the trust deed which had been given as security for the payment of said note became, as a matter of security, *functus*, and that said deed was never, as a matter of law, any security for the payment of the note sued on herein.

The deed, having been executed and delivered to be held as security for the payment of the \$15,000 note, must be treated in effect as a mortgage. When the entire indebtedness secured by a mortgage is paid and satisfied, such mortgage ordinarily becomes *ipso facto* null and void. In this instance the mortgage was given by both the husband and wife to secure the \$15,000 note. When that note was paid, the husband and wife could doubtless have executed and delivered another note, and agreed that the deed theretofore made and delivered should be still retained by the payee of the new note as security for the payment thereof. But this was not done in this instance. The transactions with reference to the new note were made without the wife being in anywise a party thereto. To hold the deed good as security for the new note, it was necessary that something should have been done by the husband and wife equivalent to the legal execution of a mortgage, or a deed in trust to serve the same purposes as a mortgage.

The land covered by this deed is in the state of California. The statutes of that state are not pleaded. Therefore, we are required, as a matter of law, to act upon the assumption that the statutes of that state with reference to mortgages

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and deeds of property given to serve the purposes of mortgages are the same as the laws touching such matters in our own state. Here a mortgage given by the husband upon community property without the wife joining in the execution thereof is absolutely void. It therefore follows that the deed of this property, in so far as it was intended to serve as security for the payment of the note sued on, was and is void. Hence the statute in question did not forbid the bringing of this action, as the note was not secured.

It is contended by appellant that, under the laws of Montana, respondent Louise E. Dabney could be held for this indebtedness, and that the transaction by her husband was sufficient to bind her and her property. The following statutes of Montana are pleaded:

“Montana Civil Code: Sec. 212. The husband must support himself and his wife out of his property by his labor. If he is unable to do so, she must assist him as far as she is able.

“Sec. 213. Neither husband nor wife has any interest in the property of the other, except as mentioned in the preceding section, but neither can be excluded from the other's dwelling.

“Sec. 214. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried, subject in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

“Sec. 218. Neither husband nor wife, as such, is answerable for the acts of the other.

“Sec. 220. All the property of the wife owned before her marriage and that acquired afterwards is her separate property. The wife may, without the consent of her husband, convey her separate property or execute a power of attorney for the conveyance thereof.

“Sec. 222. The filing of the inventory in the clerk's office is notice and *prima facie* evidence of the title of the wife.

"Sec. 223. The earnings and accumulations of the wife are not liable for the debts of the husband.

"Sec. 227. The separate property of the wife shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of eighteen years, but such exemption shall extend only to such property of such wife as shall be mentioned in an inventory thereof, as provided in section 221 and 222. And in no case shall any of the separate property of the wife be liable for the debts of the husband, unless such property is in the sole and exclusive possession of the husband, and then only to such persons as deal with the husband in good faith on the credit of such property, without knowledge or notice that the property belongs to the wife. But the separate property of the wife is liable for her own debts, contracted before or after marriage.

"Sec. 247. The property rights of the husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

"Sec. 253. A married woman may sue and be sued in the same manner as if she were sole.

"Sec. 254. The contracts made by a married woman, in respect to her separate property, labor or services, shall not be binding upon her husband, nor render him nor his property liable therefor; but she and her separate property shall be liable on such contracts in the same manner as if she were sole.

"Sec. 255. A married woman may make a will in the same manner and with the same effect as if she were sole, except that such will shall not, without the written consent of her husband, operate to deprive him of more than two-thirds of her real estate, or more than two-thirds of her personal estate.

"Sec. 256. A married woman may make contracts, oral or written, sealed or unsealed, and may waive or relinquish any right or interests in any real estate, either in person or by attorney, in the same manner to the same extent and with the like effect as if she were a single woman.

"Sec. 257. No estate is allowed the husband as tenant by courtesy upon the death of his wife.

"Montana Code of Civil Procedure: Sec. 3452. In this state there is no common law in any case where the law is

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declared by the code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the code or other statutes, the common law shall be the law and rule of decision.

"Montana Civil Code: Sec. 221. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the same manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the county clerk of the county in which the parties reside.

"Montana Compiled Statutes (1887): Sec. 1439. That from and after the passage of this act women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone."

It is urged that it does not appear that Mrs. Dabney filed the inventory mentioned in these statutes, and that therefore she cannot escape liability with her husband upon the indebtedness evidenced by this note. It appears, however, that §§ 221 and 222 have been held by the supreme court of Montana to be repealed, and consequently that portion of § 227 referring to §§ 221 and 222 would be without virtue. *Kelley v. Jefferis*, 13 Mont. 170, 32 Pac. 753; *Lambrecht v. Patten*, 15 Mont. 260, 38 Pac. 1063. As Montana has no community law system, and as the indebtedness for which this note was given was not for the necessities mentioned in § 227, we think, in the light of the other sections quoted from the statutes of that state, that Mrs. Dabney is not liable upon this note.

It is suggested by respondents that, if the case should be reversed, this court should remand the same with directions to permit the defendants to offer proof of the "first affirma-

tive defense contained in the answer of Joseph B. Dabney;" that we should pass upon the question of whether said "first affirmative defense" constitutes a legal defense. On account of the condition in which the record comes here, we are unable to do this. The answer appearing in the record sets forth what it calls defendant's "first affirmative defense," and contains no other affirmative defense. The first portion of said "first affirmative defense" alleges facts which it is claimed constitute usury. This defense was waived upon the trial. No demurrer or motion or ruling thereupon appears in the record.

The judgment of the honorable superior court is affirmed as to Louise E. Dabney, and reversed as to Joseph B. Dabney.

MOUNT, C. J., DUNBAR, CROW, FULLERTON, and HADLEY, JJ., concur.

[No. 6336. Decided October 24, 1906.]

MATTIE E. REDDING, *on Her Own Behalf and as Guardian Ad Litem of Nina B. Redding et al.*, Appellant, v. PUGET SOUND IRON & STEEL WORKS, Respondent.¹

JUDGMENT—VACATION—TERMS—ATTORNEYS' FEE. Upon the vacation of a judgment entered for want of prosecution, it is discretionary for the trial court to make the same conditional upon the payment of an attorney's fee in excess of the statutory fee for the trial of a cause without a jury.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered December 9, 1905, in favor of the defendant for costs, upon failure of plaintiff to comply with the conditions of an order vacating a judgment of dismissal for want of prosecution. Affirmed.

W. F. Hays, for appellant.

Hudson & Holt, for respondent.

¹Reported in 87 Pac. 119.

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Opinion Per Curiam.

PER CURIAM.—This cause was originally set for trial on April 25, 1905. Upon application of appellant, it was continued until June 1, 1905, and a further continuance was had until June 7. Upon that date it was called for trial, neither appellant nor her attorneys being present, whereupon the action was dismissed for want of prosecution. Subsequently there was an attempt by the appellant to have the judgment of dismissal vacated, and the court did, on the 27th day of October, 1905, make an order vacating said judgment, on condition that appellant pay all costs incident to the entry of said judgment, and the costs of witnesses paid on the final hearing, and \$50 attorney's fees. The appellant, upon petition and affidavits, asked the court to modify said conditional order setting aside said judgment, so as to allow the defendant the witness fees, court costs, the statutory attorney's fees, and no more. This motion was denied and, the order not being complied with, the court gave final judgment to the defendant for its costs incurred. From this judgment this appeal is taken.

The appellant does not deny the power of the court to impose terms as a condition precedent to vacating the judgment, but the principal objection is that the court had no power to assess an attorney's fee of \$50, or any other attorney's fee greater than the statutory attorney's fee of \$10, upon the trial of the cause without a jury. We have examined the record in this case and, without discussing it, are satisfied that the court was justified in making the several different orders in the case that it did make, and that it also had authority to assess any reasonable penalty upon the appellant as a condition precedent to vacating the judgment. It matters not whether that penalty was in the form of costs or attorney's fees; if it was necessary to reasonably reimburse the respondent for the expense and delay that it had been to on account of appellant's action, the action of the trial court in that respect would not be disturbed by this

court. On that question it is said by Black on Judgments, § 352:

"Since the opening or vacating of a judgment, in any case where an imputation of laches or inattention rests upon the party applying, is an act of grace and favor and is discretionary with the trial court, it has power to impose such terms as may be just and reasonable, as a condition to the granting of such relief, and its action in this respect will not be interfered with, unless for a gross and manifest abuse of discretion. . . . It is clearly within the power of the court to make the payment of costs a condition to granting the relief asked, including, in a proper case and where justice appears to require it, the disbursements of the opposite party, a proper fee to his attorneys, and his reasonable personal expenses incurred in connection with the suit, and also the costs of the motion itself."

To the same effect is 15 Ency. Plead. & Prac., p. 10.

Being unable to discover any abuse of discretion on the part of the court in the whole transaction, the judgment is affirmed.

[No. 6394. Decided October 24, 1906.]

I. P. CALLISON, *Respondent*, v. MARY R. SMITH, *Appellant*.¹

TAXATION—FORECLOSURE—SUMMONS. A summons for publication in a tax foreclosure proceeding which clearly states the time for appearance, nature and purpose of the action, and complies with the statute in all particulars except to omit the alternative demand that defendants appear "or pay the amount due," is sufficient to confer jurisdiction to enter a default judgment.

SAME—JUDGMENT—AMOUNT OF TAX. The fact that a tax judgment against real property includes \$2.40 personal taxes, not lawfully assessed on the real estate, will not invalidate a judgment where the defendants were legally served and failed to appear and contest the matter in the foreclosure action.

TAXATION—FORECLOSURE—PUBLICATION OF SUMMONS. Upon the publication of a tax foreclosure summons, proof made by a man of the same name as plaintiff will not be presumed to be made by the

¹Reported in 87 Pac. 120.

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Opinion Per CROW, J.

plaintiff, especially when to do so would question the jurisdiction of the trial court.

SAME. A summons for publication in a tax foreclosure may be published in a paper owned by the plaintiff, and proof of publication made by the plaintiff as owner of the paper would not be void.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered March 26, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a tax lien. Affirmed.

Forney & Ponder, for appellant.

Maurice A. Langhorne, for respondent.

CROW, J.—Action by the plaintiff, I. P. Callison, against the defendants, Zack Cole and Mary R. Smith, to foreclose a delinquent tax certificate. Service was made by publishing in the "People's Advocate," a newspaper of general circulation in Lewis county, a summons which, omitting the caption, reads as follows:

"You are hereby summoned to appear within sixty days after the date of the first publication of this summons, exclusive of the first day of said publication, which will be on the third day of July, A. D. 1903, and defend the above entitled action in the above entitled court and answer the complaint of the plaintiff and serve a copy of your answer upon the undersigned attorney for the plaintiff at his office below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of the plaintiff's complaint, which has been filed with the clerk of said court. This action is brought upon a certificate of delinquency numbered 388, issued on the first day of July, A. D. 1899, for the amount of \$22.70 with interest at 15 per cent per annum by the county of Lewis, state of Washington, and now owned and held by the plaintiff herein for delinquent taxes for the years 1897 and 1898 upon the following described real estate situate in the county of Lewis, state of Washington, to-wit: N. E. $\frac{1}{4}$ Sec. four (4) township thirteen (13) north, range one (1) west W. M. Plain-

tiff has also paid taxes on the above described property for the years 1899 and 1900 amounting to \$35.88, for which he also seeks payment, which amounts, with interest at 15 per cent per annum, now amount to \$85.59, and he now seeks to obtain judgment foreclosing the lien thereof for such taxes and costs and for a sale of said real estate according to law. J. E. Willis, Plaintiff's Attorney. P. O. address, Chehalis, County of Lewis, State of Washington."

Proof of such publication was made by the affidavit of one I. P. Callison, who deposed that he was the publisher of the People's Advocate, and who, the defendant now claims, is the plaintiff in this action. The defendants failing to appear, a foreclosure decree was entered, and the treasurer of Lewis county, on September 19, 1903, executed and delivered to plaintiff a tax deed for the land. On August 29, 1904, the defendant Mary R. Smith, claiming to be the owner of the property, and being a nonresident of the state of Washington, filed her motion and petition to vacate the judgment and sale. The trial judge entered a judgment dismissing this petition, and the defendant Mary R. Smith has appealed.

No statement of facts has been brought to this court, and the only question now before us is whether the findings made by the trial court sustained the judgment. The findings show that the only service made was by publication of the summons above set forth. 3 Bal. Code, § 1751, Laws 1901, p. 384, with other requirements, provides that the summons shall direct the defendant "to appear within sixty days after the date of the first publication . . . and defend the action or *pay the amount due.*" The summons herein contains no alternative direction to the defendants to "pay the amount due," and the appellant contends that it is void by reason of such omission. This court has held that, in proceedings to foreclose a tax certificate, a publication summons directing a defendant to appear and defend the action within sixty days after the service of the summons was void under the requirements of the above section. *Thompson v.*

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Robbins, 32 Wash. 149, 72 Pac. 1043; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Young v. Droz*, 38 Wash. 648, 80 Pac. 810; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606. The appellant has cited *Thompson v. Robbins*, *supra*, and insists that it is controlling here; that the statute must be strictly followed in every particular, and that the summons now before us is void. In the cases above mentioned the time within which the defendants were required to appear was not definitely fixed at sixty days after the first publication, as provided by the statute. A plaintiff is entitled to judgment by default only upon failure of a defendant to appear and plead within the statutory time, and it is essential that a specific statement of the exact time for answer be incorporated, so that no misapprehension may arise upon the part of a defendant as to when a plaintiff will enter judgment after nonappearance. A definite time for answering becomes, therefore, an essential part of the process, and this court held that the statute should be strictly followed in that particular.

In the case at bar, the omission complained of does not seem to us to have been one of such vital importance as to prevent the court from acquiring jurisdiction. The summons by its terms has substantially complied with all of the essential provisions of the statute. The defendant is directed to appear and defend within the exact time fixed by the statute, the nature of the action and the relief demanded are both clearly stated, and we fail to understand why the chance omission of the words "or pay the amount due," should avoid the service. Any action would necessarily be terminated should payment of the amount claimed be made before judgment, while a tax foreclosure may be avoided by payment at any time before delivery of a deed. Payment in a proceeding of this character would prevent a foreclosure, and would therefore be one method of defense, which the summons informs the defendant must be made within a definite

and fixed time after the date of the first publication. A defendant, when informed by a summons that he has a definite time within which to appear and defend, would most certainly know that he could, if he so preferred, determine the action by payment of the amount due within that time. How, then, could he be deceived or misled by the failure of the summons to affirmatively advise him of his right to pay? While a plaintiff should endeavor to comply with all the requirements of the statute, we nevertheless conclude that there has been no fatal omission in the summons in this case.

The findings further show that the appellant Mary R. Smith owned the land during and since the years for which the delinquent taxes were levied; that the defendant Zack Cole, being a former owner, still held the record title, and that \$2.40 of personal taxes assessed against Zack Cole were charged by the county treasurer, under Bal. Code, § 1748 (P. C. § 8688), against the land and included in the certificate of delinquency, and the judgment entered thereon. The appellant now contends that her real estate was not liable for Cole's personal taxes; that she is therefore entitled to defend as to that item, and that the default judgment should be vacated to enable her to do so. This contention cannot be sustained. *Swanson v. Hoyle*, 32 Wash. 169, 72 Pac. 1011.

The last contention made by appellant is that the summons was not legally served, or, in other words, that it was not legally published. It appears from the record that the affidavit making proof of publication was verified by one I. P. Callison, whose name is identical with that of the respondent in this action. No showing appears to have been made that the I. P. Callison who made the affidavit and I. P. Callison, the respondent, are one and the same person; nor did the court make any finding showing such identity, if it existed. Two different persons might be known by the same name, and we do not think we are justified in presuming that I. P. Callison, the publisher, and I. P. Callison, the respond-

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Syllabus.

ent, are one and the same person, especially when we would be indulging in such presumption for the sole purpose of questioning the jurisdiction of the trial court. But were we to presume the identity to be as contended by the appellant, the publication would not therefore be void. We do not know, nor can we presume, that any other paper was published in Lewis county. The statute made it the duty of the plaintiff to publish in some paper in that county, and it may have been necessary to publish in the People's Advocate. Further, there is nothing in the statute prohibiting publication in a paper owned by the respondent.

We find no error in the record, and the judgment is accordingly affirmed.

MOUNT, C. J., DUNBAR, HADLEY, and FULLERTON, JJ.,
concur.

[No. 6433. Decided October 26, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. HERBERT
DILLEY *et al.*, *Appellants*.¹

INDICTMENT AND INFORMATION—FURNISHING COPY. Error cannot be predicated upon failure to furnish the defendants with a copy of the information, after plea thereto and announcement that they were ready for trial, without any demand therefor or objection to the trial.

CRIMINAL LAW—ROBBERY—EVIDENCE OF CONSPIRACY. Upon a joint prosecution for robbery under claim that a conspiracy existed between defendant D. and the other defendants, conversations between D. and the prosecuting witness, had while the other defendants were not present, are properly admitted in evidence against D., and against the others if further evidence should show concerted action between them.

SAME—EVIDENCE OF CONCERTED ACTION—SUFFICIENCY. There is sufficient evidence of concerted action on the part of defendants, jointly prosecuted for robbery, to admit evidence of conversations had with one of the defendants while the others were not present,

¹Reported in 87 Pac. 133.

where it appears that by such conversations the prosecuting witness was lured to the home of the defendants where he was attacked and robbed by all of the defendants actively participating therein.

SAME—LETTERS—ADMISSIBILITY. In such a case, a letter written by one of the conspirators suggesting the line of evidence to be used by the two other defendants on the defense of the writer, which letter fell from her room, is sufficiently identified from its contents without proof of the handwriting or signature, and it is admissible against the other defendants in case attempted correspondence was going on between them at the time, and the other defendants were concerned in the offense, although the letter alone was not sufficient evidence of the conspiracy.

SAME—EVIDENCE OF CONSPIRACY. In such a case there is sufficient *prima facie* evidence of a conspiracy to necessitate the submission of the question to the jury.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered April 7, 1906, upon the trial and conviction of the defendants jointly charged with the crime of robbery. Affirmed.

Maurice A. Langhorne and Forney & Ponder, for appellants.

J. R. Buxton and A. J. Falknor, Assistant Attorney General, for respondent.

HADLEY, J.—The defendants in this cause were jointly charged with the crime of robbery, and were also jointly tried. A verdict of guilty was returned. Each defendant was sentenced to serve a term of six years' imprisonment in the state penitentiary, and they have all appealed.

They first complain that neither they nor their attorneys were furnished with a copy of the information, as required by Bal. Code, § 6880 (P. C. § 2132). No demand or request was made for a copy of the information, and no objection was made to going to trial without it. Appellants had appeared to the information both by demurrer and by pleas. They had demanded separate trials and afterwards withdrawn the demand. They had announced themselves ready

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for trial, and then merely stated that they wished the record to show that they had not been served with a copy of the information. Having announced themselves ready for trial when the case was called, and not having actually objected to going to trial without the copy, they cannot now be heard to urge, after conviction, that they were prejudiced. *Diffin v. State* (Tex. Cr.), 63 S. W. 128; *State v. Green*, 66 Mo. 631; *State v. Jackson*, 12 La. Ann. 679.

The theory of the state in the presentation of its testimony was that a conspiracy existed between all of the appellants to rob the complaining witness, and it is urged by appellants that the court erred in admitting evidence concerning the acts and declarations of one appellant committed or made when not in the presence of the others. It is conceded that direct and positive evidence of a formal agreement between conspirators is not required, and that a conspiracy is usually established by proof of facts and circumstances from which an unlawful combination may be inferred. It is, however, urged that there was not proof of facts and circumstances in this case from which a conspiracy could be inferred. Objections were made to evidence concerning conversations between appellant Alice Dilley and the prosecuting witness, not occurring in the presence of the other appellants. When ruling upon the admission of this testimony the court said:

"I think I will rule this way: That her statements made at that time, if she made any, are competent evidence against her at this time. But as to whether or not it constitutes any evidence against the other two defendants depends upon whether or not the proof shows that there was concerted action between all three of the defendants."

We think this was manifestly the correct ruling at the time. The conversations were certainly admissible as against Mrs. Dilley, and as the state could not introduce its whole chain of evidence at one time, it remained to be seen whether such

facts would appear as would make it admissible against the coappellants. The parties were being tried jointly, and such evidence as was admissible against one of them was properly admitted, its applicability to the others to be thereafter controlled by proper instructions when all the evidence was introduced. For convenience the acts and declarations of one are admitted before sufficient proof of a conspiracy is given, the state undertaking to furnish such proof at a subsequent stage of the cause. 1 Greenleaf, Evidence (16th ed.), § 184a; *State v. Winner*, 17 Kan. 298; Underhill, Criminal Evidence, § 494.

Complaint is, however, made that sufficient facts at no time appeared to make these conversations admissible as against the coappellants, and that the court refused to so instruct the jury. There was testimony as to the following facts: The appellants Dilley were husband and wife, and appellant Carland was an acquaintance of the two. The Dilleys lived in the city of Centralia in a sparsely populated district, about a mile from the city hall. The prosecuting witness, Alderman, was at that time night marshal of said city. On the night of January 23, 1906, Alderman was in attendance at a meeting of the city council at the city hall. About ten o'clock he was called outside of the room by a messenger sent to him by Mrs. Dilley. On going out he saw Mrs. Dilley, who had with her her little baby in a baby carriage. She told him her husband was away at work at Martin's mill, and that she desired Alderman to accompany her home. He told her that Mr. McFarland, who was present and who was the messenger above mentioned, would go with her as he, Alderman, desired to remain at the meeting of the city council. To this she objected, saying she did not know McFarland, and that she wished Alderman to go with her. Thereupon Alderman consented to go, and did go with her to her home. The night was rainy, and a part of the way is described as a "lonely walk." The road for some distance was

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along the railroad track and many side tracks crowded with freight cars, a place which Alderman said he regarded as dangerous for a woman to be alone at night.

Soon after they started Mrs. Dilley stepped into a restaurant, as she said, to get a drink of water. Alderman remained outside and did not watch her. He does not know what she did during the one or two minutes she was gone. There was also evidence that her husband and Carland were together around town that evening, and that Dilley was not working at Martin's mill. After she came out of the restaurant she and Alderman proceeded, he wheeling the baby carriage after they had reached the railroad track. About that time she asked him if he had sold his livery barn. He told her he had, and she then asked him if he did not get a pretty good price, to which he replied that he received a fair price. She also asked him where he carried his gun, and he told her that he carried it in his right-hand outside coat pocket. As they approached her house, she said she was afraid to go into the house alone, as there had been a number of "hoboes" around, and asked if he would go in with her. He consented to do so. She opened the door and he went in, taking the baby carriage up the three steps into the house. She asked him to sit down, when he told her he was in a hurry to get back, but that he would like a drink of water. She said she would get him a drink, and he sat down to wait until she did so.

When they entered the house a small burning lamp was sitting to the left of the door, which she immediately removed to a stand across in another corner of the room. After sitting for a moment or two, he heard the bedroom door open, which had before stood ajar about two inches, and Dilley and Carland rushed from the room. The door was about four feet from where he sat, and the lamp above mentioned was near his location before it was removed. They hit him with their fists and held him, and Mrs. Dilley came rushing

from behind some hanging curtains and, putting her hand into his outside coat pocket, grabbed his gun and said, "Boys, I have got his gun." Dilley took the gun and drew it upon Alderman, saying: "I have got you. I will fix you for running around with my woman." Alderman further says:

"Then he said: 'Do you know what I am going to do with you?' and I said: 'No.' He says: 'Take off that coat and vest,' and I said: 'I would not get rash or do anything like that.' And he says: 'Take it off or I will shoot your heart out in a minute.' I took it off, thinking I might get some show in taking it off. I had a billie in my pocket—a club—and I thought I might get some show to get at that, but he held the gun on me very close and told me: 'If you make a move I will kill you.' So I takes them off and Carland takes the clothes and went through them as I takes them off."

After they required him to remove his clothes, and after they had taken everything from his pockets, Alderman says:

"He said: 'Do you know what I am going to do with you?' and I said: "No." Then with an oath he said: 'I am going to make you go down town just in the shape that you are now in;' and I said: 'No, that is where you are wrong; you can't do that. You may kill me, but you cannot do that.' With that he came at me with the knife, hollowing to Red to come on too. Well, they had a scuffle just a short time with me. They made several slashes at me, cut me over the eye in the head here, made a slash at my neck, and I grabbed the knife with my left hand. It just grazed my neck; just cut through the hide. It was a butcher knife. It cut all the leaders in this hand. I threw out my hand and caught the knife, but I could not hold it, and it dropped to the floor, and Mrs. Dilley jumps and grabs the knife, hollowing, says: 'Don't kill him,' and Dilley jumps back and throws the gun on me again and says: 'If you make a move I will kill you.' . . . Then he says: 'There is just one way that you can get out of this,' and I says: 'Boys, it is up to you.' He says: 'Dig up two hundred dollars.' I says: 'I haven't got it. You went through my clothes and you see I haven't got it in my clothes, but if you will let me come down

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town I think I can get you the money.' He wanted to know where I could get it, and I told him I thought at McGrail's. He says: 'All right.' They let me put on my clothes except my pants. They took the suspenders off these pants, and they gave me a pair of Dilley's pants. Red put the suspenders on for me and fixed them, and then we started down town, with Carland holding on to my arm and Dilley walking behind me, and said: 'If you make a crooked step, if you make any move, I will kill you just the same as I would a dog.' In going down he said: 'You sold your barn. Did you get a pretty good price for it?' I says: 'I got a fair price for it.' He says: 'Can't you give me a check?' And I said: 'I have got no check, and I have got no money. I cannot give you a check.' And he says: 'Well, you dig it up somewhere,' and I says: 'I guess I can get it all right as soon as I can get down town.' We went on down to town and into McGrail's saloon, and Tom was in there."

McGrail, the proprietor of the saloon, expressed surprise at the appearance of Alderman, and asked him what was the trouble. Alderman asked him if he could give him \$200, "at the same time giving him the wink." McGrail insisted upon talking to Alderman alone in another room. After he had told McGrail what had occurred, the latter, with Alderman, following him, returned to the saloon and thereupon both Dilley and Carland ran away. Later during that night, all three of the appellants were arrested at the Dilley home, and were all sleeping in the same room.

We have made the above extended statement of facts appearing in evidence in order to show whether there were concurring facts to indicate a concerted purpose between all the appellants to rob the prosecuting witness, and such facts as were sufficient for submission to the jury upon that subject. We believe the statement of the evidence itself shows that there was sufficient concerted action shown for submission to the jury, and that no further argument is required upon the subject. That the complaining witness was robbed there could have been no doubt under the evidence submitted

by the state. Valuable property was taken from him forcibly, by violence and by putting in fear. All the appellants actively participated in the consummated act, and it was a question for the jury whether the acts and declarations of Mrs. Dilley were in furtherance of a common design. Wharton, Criminal Evidence (9th ed.), § 698, and cases cited. It was not error therefore to admit evidence of the acts and declarations of Mrs. Dilley as against the other appellants, in view of all the evidence. And it was not error to refuse to instruct the jury unconditionally that such acts and declarations could in no event be considered against her coappellants.

It is, however, urged that in any event the court erred in admitting in evidence a certain letter, and especially in permitting the jury to consider it without an instruction to exclude it from their consideration except as against Mrs. Dilley. It was the theory of the state that the letter was written by Mrs. Dilley to be received by her husband. It began as if especially intended for "Kid," who is frequently addressed in the second person, and it also made reference to "Red," these being nicknames by which Dilley and Carland were respectively called. The contents showed without doubt that the writer referred to what had occurred between Mrs. Dilley and Alderman on the night of the alleged robbery, and also to what occurred at the Dilley home when all the appellants were present. It contains suggestions as to what statements should be made in order to harmonize with statements which had been made by the writer. The references to the first person as the writer could have been to no other than Mrs. Dilley and to her relation to the circumstances heretofore detailed. It contains suggestions that the writer had told others that "he," not naming any one, had sought improper relations with her, and that "you boys came out of that closet and that you boys were in there unknown to me, and you want to say that Red was sitting up

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by the stove when they came that morning after us." It also contained the following:

"Kid, don't get mad over the note I sent you this morning. Kid, I told them that I did not know there was any knife in it until it was all over with and I picked it up off the floor myself, and Red picked the gun up. . . . Kid, don't say anything to that nigger now for he will switch on us writing these notes. Keep still and write me notes just the same."

The letter was long and contained matter unfit for insertion here. It will be seen that the letter referred to a previous correspondence with the person addressed, but there was no other direct proof that such correspondence had taken place. Mrs. Dilley was confined alone in an upper room in the jail building, her coappellants being confined below. The letter was seen falling directly from the window of Mrs. Dilley's room, and was immediately secured and kept until the time of the trial. It was not signed by any one, and there was no identification of the handwriting. Objection was made to it in behalf of Mrs. Dilley, on the ground that the handwriting had not been proved. However, it fell directly from her room, and it was shown that there was no other person there at the time. We think these circumstances were sufficient to connect her with it without an actual identification of the handwriting, and that it was properly admissible as against her.

Further objection was made to the letter in behalf of Dilley and Carland, on the ground that it had not been shown that communication was invited by them; that as to them it was hearsay and incompetent, for the reason that, if there was any conspiracy, it was closed before the letter was written, and that the admissions or declarations of a coconspirator made after the termination of the conspiracy, not in the presence of the others, are inadmissible. The court ruled that the letter should be received at that time as evidence

against Mrs. Dilley, and at the same time instructed the jury that it was not to be considered as evidence against the others unless they should find from all the evidence that about that time a correspondence or attempted correspondence was going on between the appellants, and that the two male appellants were concerned therein, in which case it would become evidence against all three of them. It is urged that there was at no time proof of such correspondence other than the letter itself, and that the court should, in any event at the close of the evidence, have expressly excluded the letter from the jury's consideration as against Dilley and Carland.

We think sufficient facts appeared in evidence for submission to the jury as to a common design or conspiracy not only to rob the complaining witness, but also to fabricate a defense as an excuse for the conduct of appellants. The evidence of what occurred at the Dilley home showed a purpose to assert that Alderman had accompanied Mrs. Dilley to her home with an improper purpose, for which her husband sought reparation, and that theory was maintained at the trial by the appellants. If such was the conspiracy it did not end with the commission of the alleged robbery, but it extended to the time of the trial, and was pending when the letter in question was written. On that theory it was not error for the letter to go to the jury as against all the appellants, even though the court may have submitted it to them on the theory that there was evidence of an actual correspondence. In cases where the conspiracy comprehends not only the actual offense committed, but from the beginning extends to and includes a common design or scheme to fabricate a defense, it is held that the conspiracy continues to exist, even after the principal act is done, and that the declarations of one coconspirator made under such circumstances and in furtherance of such design, are admissible as against all, though made subsequent to the principal act. In *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814, the court said:

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"It is claimed that if any conspiracy was entered into it terminated with the killing of Miller, and that the evidence of any act or declaration of Jefferson Dayton subsequent to that time is inadmissible. If, as claimed, however, the conspiracy also had for its purpose to prevent suspicion from attaching to the defendant, and not fully completed when Miller was killed. . . . Whatever the defendant himself may have done, in the fabrication of evidence to prevent suspicion from attaching to him, or to avoid a prosecution, was proper to be shown to the jury, and considered by them. . . . And if another person conspired with him, to assist in the accomplishment of this purpose, his acts and declarations, in furtherance of the common design are, we think, admissible." See, also, *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; *Scott v. State*, 30 Ala. 503.

The letter was admissible as tending to establish the existence of a conspiracy not only to rob the complaining witness, but also to fabricate testimony to conform to a theory for defense. The letter itself was not sufficient to establish a conspiracy, but when taken in connection with the other evidence in relation to an actual robbery, it was competent as tending to show the general design of the conspirators. There was sufficient *prima facie* evidence of a conspiracy, and it then became a question for the jury to say whether there was in fact a conspiracy.

"It is insisted that the court erred, in the instruction above set out, in leaving the jury to determine whether a conspiracy existed. It is claimed that that question must be determined by the court. It is true, the court must determine, in the first instance, whether there is sufficient *prima facie* evidence of a conspiracy to justify the submission to the jury of the acts and declarations of an alleged conspirator as evidence against his fellows. But, ultimately, it is for the jury to determine whether, upon the whole testimony, any conspiracy has been shown; and if they find that no conspiracy has been established, it is then their duty not to consider the acts and declarations which have been admitted of a supposed conspirator." *Miller v. Dayton, supra*.

A number of errors are assigned upon the instructions given to the jury, and upon the refusal to instruct as requested by the appellants. The theory of the defense was sufficiently covered by the instructions given, and we think appellants' rights were not prejudiced. We find no prejudicial error under other minor assignments, and having discussed at length the principal questions raised on the appeal, we believe it is unnecessary to discuss in detail the numerous assignments of error.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, ROOT, CROW, DUNBAR, and RUDKIN, JJ., concur.

[No. 6481. Decided October 26, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Martin D. Barnes, Appellant*, v. THE CITY OF BLAINE
*et al., Respondents.*¹

MUNICIPAL CORPORATIONS—DEBT CREATED UNDER ILLEGAL INCORPORATION—WARRANTS ON SPECIAL IMPROVEMENT FUND—RATIFICATION—ISSUANCE OF FUNDING BONDS. Warrants drawn on a special improvement fund by a void municipality cannot, upon its subsequent valid incorporation, be ratified by the issuance of funding bonds to pay such indebtedness, thereby changing a special assessment liability to one of general character; since the assessment district, and not the city, was liable therefor.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered July 18, 1906, upon overruling a demurrer to the defendants' answer, dismissing an application for a mandamus to compel a city to levy taxes for the payment of bonds. Affirmed.

Newman & Howard, for appellant.

G. H. Westcott, for respondents.

¹Reported in 87 Pac. 124.

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Opinion Per Root, J.

Root, J.—Relator instituted this proceeding to compel the city of Blaine and its officers to require the levy of taxes sufficient to pay certain interest coupons, aggregating in amount \$6,150, and to thereafter each year levy upon the taxable property of said city, in addition to the tax for other purposes, a sufficient sum to pay interest on each of certain bonds described in relator's affidavit, and to provide a sinking fund sufficient to pay the bonds at maturity. Respondents answered, admitting most of the allegations in relator's amended affidavit, and setting up a separate affirmative defense, to which relator demurred. The court overruled the demurrer, and relator declining to amend or plead further, the court dismissed the proceeding. From the order overruling the demurrer and dismissing the action, relator has appealed to this court.

In May, 1890, the town of Blaine was incorporated as a municipal corporation of the fourth class under the provisions of the act of March 27, 1890, and included within its area three square miles, nearly one-half of which was unplatted. The town at once assumed all the duties, and exercised all the powers, incident and belonging to municipal corporations of that class. Among other acts which it performed was the opening, grading, and sidewalking of streets and avenues, such improvements being confined to about one-sixth of the area of the town as defined by its boundaries. On March 4, 1891, in a suit in the nature of a *quo warranto* proceeding, instituted by the attorney general against said town and its acting officers, the incorporation was declared "illegal," and the act of the board of county commissioners in incorporating it "null and void," for the reasons, among others, which were enumerated in the judgment rendered therein, "that it contained an area of more than one square mile" and "more than forty acres of unplatted land." On May 4, 1891, following entry of the decree in the suit just referred to, the present city of Blaine

was incorporated, the boundaries of which comprised the same territory that had been known as the "Town of Blaine" except a narrow strip along the entire northern boundary containing about one hundred and twenty acres, which area had been a part of the town of Blaine, but did not, and does not, form any portion of the territory of the city of Blaine.

During the time the town of Blaine assumed the duties and exercised the powers of a municipal corporation of the fourth class, warrants were issued in payment of municipal expenses, including street crossings, aggregating \$18,000, which warrants were drawn in the usual form of municipal warrants, and signed by the clerk and the mayor, and made payable from the general fund of said town; also warrants were issued in payment for street improvements, and payable from a special fund designated according to the name of the street upon which the consideration for the warrant had been expended, aggregating \$96,000; assessment districts being created in each case, and assessments being made for the cost of such improvement. In November, 1891, the city of Blaine enacted an ordinance, known as "Ordinance No. 41," providing for the calling of an election to ratify and assume the indebtedness of the former "town of Blaine and the present city of Blaine," aggregating, as stated in Ordinance No. 41, "\$63,700 and accrued interest." This sum was intended to include, and did include, all the unpaid warrants issued by the "town of Blaine," not only such warrants as were issued for general municipal purposes, and payable from the "general fund," but all the warrants issued by the "town of Blaine" for street improvements, and payable from special street improvement funds. At the same time Ordinance No. 41 was adopted, there was also an ordinance adopted by the city of Blaine, known as "Ordinance No. 40," providing for the calling of an election and submitting to the electors the proposition to "borrow \$70,000 for the municipal purpose of funding the indebtedness of the present city of Blaine

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and the former town of Blaine, and to issue its negotiable bonds, etc." Both of these ordinances were passed by the city council at a special meeting called for that purpose.

The election to vote upon the propositions contained in ordinances numbered 40 and 41 was held on December 7, 1891, and all the propositions contained in both ordinances were carried by more than the necessary three-fifths vote of the electors voting at such election. At the time this election was held, instead of the total amount of indebtedness as described in said ordinances, being, as stated therein, \$70,000, it was in fact \$85,000, a sum of \$15,000 in excess of five per cent of all the taxable property in the city of Blaine, as ascertained by the last assessment for municipal purposes. In June, 1892, the council of the city of Blaine passed ordinance No. 44, authorizing the issuance of the funding bonds, the subject of this suit. On each of these funding bonds was printed an act of the legislature of the state of Washington (Laws 1891, p. 261, chap. 128), and Ordinance No. 40, and specifically made a part of each of such funding bonds. Between September 30, 1893, and January 5, 1894, the mayor and clerk of the city of Blaine delivered these funding bonds to the holders of the warrants described in ordinance No. 41, in exchange for such warrants at par, until \$66,600 of the \$70,000 had been so delivered. The city of Blaine did not receive any consideration for the \$66,600 funding bonds so exchanged, except the warrants described in said ordinance No. 41, which were in fact practically all the special street improvement fund warrants issued by the town of Blaine.

The total valuation of all taxable property of the city of Blaine, at the date of the election, when it attempted to assume and ratify the indebtedness of the former town of Blaine and authorized the issuance of the funding bonds to pay such indebtedness, as ascertained by the last assessment for general municipal purposes, was the sum of \$1,412,513;

at which time the total amount of unpaid taxes due said city was \$4,260, with no funds on hand. The total valuation of said city when said funding bonds were issued, as ascertained by the last assessment for general municipal purposes, was \$738,162, and, on the date when the said bonds were exchanged for town of Blaine warrants, such valuation was \$452,250.

We think this case is controlled by the principles announced by this court in the case of *State ex rel. Security Sav. Soc. v. Moss*, ante p. 91, 86 Pac. 1129. Upon the authority of that case, the judgment of the trial court herein is affirmed.

MOUNT, C. J., CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 6510. Decided October 26, 1906.]

ERNEST LISTER *et al.*, *Appellants*, v. THE CITY OF TACOMA
et al., *Respondents*.¹

MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — VALIDITY OF BONDS — MISTAKE AS TO PERIOD. Bonds for a local improvement, payable in cash or in ten annual installments, are not affected by a mistake in the original ordinance limiting the time for payment to five annual installments, where, upon discovery of the mistake, the city council passed another ordinance correcting the mistake, before levy of the assessment, the law not providing the time when the council should fix such time, and all the bidders and city officials having acted in the first instance under the impression that the annual installments were provided for; as no injury could have resulted to property holders under such circumstances.

Appeal from a judgment of the superior court for Pierce county, Irwin, J., entered September 12, 1906, upon findings in favor of the defendants, after a trial on the merits before

¹Reported in 87 Pac. 126.

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Opinion Per DUNBAR, J.

the court without a jury, in an action to enjoin the performance of a contract. Affirmed.

Boyle & Warburton, for appellants.

C. M. Riddell, R. E. Evans, J. W. Quick, A. R. Titlow, and
C. D. Eshelman, for respondents.

DUNBAR, J.—This is a street improvement case from the city of Tacoma. The facts are conceded. The contention is that the facts found do not sustain the conclusions of law. Briefly, the city council of the city of Tacoma, on June 20, 1906, passed a resolution of intention to pave and improve certain streets in said district, including the property in question, and to levy an assessment against the property to pay for said improvements, by issuing bonds at seven per cent interest, said bonds payable in cash or in ten annual installments, at the option of the property holders. An ordinance was passed in conformity with the resolution. By mistake an old form was used, where the number of installments had been five instead of ten, and the clerk failed to change the word "five" to "ten." The bids were made in accordance with the notice given and other provisions of the city charter, and this was the only notice given to the bidders. After the same was regularly given and published, the Asphalt Pavement Company was awarded the contract for \$56,473.

After the contract was let but before it was executed, it was discovered that the ordinance and resolution of intention to improve did not agree, by reason of the mistake which we have mentioned above. The city council, after the discovery of said discrepancy, passed another ordinance amending the second section of the first ordinance by causing the time of the payments of the assessments to be changed from five annual installments to ten annual installments.

The contention of the appellants is that the city authorities had no right to enter into the contract for the payment of this work, by reason of the expressed difference between

the resolution and the ordinance; and that the correction of the ordinance after the letting of the contract was without force or effect. We are unable to determine from the statutes or from the charter, at what time the city must determine the time of the payments to be made for work of this kind. Pierce's Code, § 3754 (Laws 1899, p. 334), provides:

"The city council or other legislative body of such city ordering the making of a local improvement at the expense, in whole or in part, of the owners of property benefited, may ordain whether payment is to be made in one sum or by installments, and levy assessment upon the property benefited for its part, or the whole of the cost as the case may be."

In the absence of a law providing the time and conditions under which the payment should be made, we must conclude that the city council would have authority to make it at any time before the assessment was made for the payment of the work, unless it appears that, by reason of the failure to make it in advance of the submission for bids, the property owners would be injured. In this case the contention is that the property owners may have been injured, for the reason that the bidders might have taken into consideration the length of the investments which they would obtain, and that an investment at seven per cent for ten years might be considered preferable to an investment at seven per cent for five years; that the bidder would therefore take that into consideration in his bid, and that the property holder might receive the benefit of such consideration in a lower bid.

The facts found by the court are to the effect that this was a purely clerical error or mistake; that the bids were based upon ten years; that all the bidders bidding on said work understood said payments to be on the ten-year plan instead of the five-year plan; that all of the city officials, including the mayor, city council, city engineer, and commissioner of public works, so understood it; that the property owners in said district so understood it; that there were re-

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monstrances filed against the doing of said work after the resolution of intention was passed; that said property owners thoroughly understood that the work was to be done upon a ten-year plan instead of a five, and that said error was a purely clerical error. So it is evident that no harm could have come to the bidders or to the city or to the property holders by reason of this mistake, because all the parties acted upon the theory that the ordinance did comply with the resolution, and that the ten-year payment plan was the plan which was considered by all parties.

But, if we understand the appellants, it is contended that other bidders might have been prompted to make a lower bid than any that was submitted had they understood that the work was to be done on the ten-year plan. It seems to us, however, that this is a possibility too remote, especially when it is considered that the ordinance and the resolutions provide that the payments may be made at the option of the property holders either in cash or by yearly installments. So that there could be really no assurance to any bidder that his investment would be made for any length of time, even for one year. We think public policy would not be subserved by holding an assessment invalid for the irregularity which is complained of in this case.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and RUDKIN, JJ., concur.

FULLERTON, J., dissents.

ROOT and CROW, JJ., took no part.

[No. 6368. Decided October 27, 1906.]

W. H. MILLER, *Respondent*, v. CALVIN PHILIPS & Co.,
Appellant.¹

VENDOR AND PURCHASER—CONTRACT TO CONVEY—BREACH—TITLE OF VENDOR. A contract to convey land providing that if the title is not good or cannot be made good in thirty days, is broken by the vendor by the institution and pendency of condemnation proceedings brought by a railroad company to appropriate a right of way across the land, and the breach entitles the vendee to a return of earnest money.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 8, 1906, upon overruling a demurrer to the complaint, in an action to recover earnest money on a contract to convey land. Affirmed.

Fogg & Fogg, for appellant, contended, among other things, that the alleged acts of the railroad company did not give it any interest in, or right to, appellant's property, and did not constitute any incumbrance thereon. *Kuhn v. Freeman*, 15 Kan. 423; *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36; Brewster, Conveyancing, § 200; Pierce's Code, § 7088 (Bal. Code, § 4333); *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543; *Shute v. Barnes*, 2 Allen 598; *Cemansky v. Fitch*, 121 Iowa 186, 96 N. W. 754; *Eaton v. Boston etc. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Port Angeles Pacific R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89; 1 Pomeroy, Equity Jurisprudence (3d ed.), § 368.

Shackleford & Hayden, for respondent. The condemnation proceeding, with the *lis pendens* notice thereof, constituted an incumbrance upon the land, and created a defect in the title. *Cavanaugh v. McLaughlin*, 38 Minn. 83, 34 N. W. 576; *Johnston v. Callery*, 173 Pa. St. 129, 33 Atl. 1036; *Nicomien*

¹Reported in 87 Pac. 264.

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Boom Co. v. North Shore Boom etc. Co., 40 Wash. 315, 82 Pac. 412; *Lewis, Eminent Domain*, p. 756, § 306; *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244, 91 Am. St. 271. A title to be good must be free from litigation or probable litigation. *Swayne v. Lyon*, 67 Pa. St. 436; *Speakman v. Forepaugh*, 44 Pa. St. 363; *Stevenson v. Fox*, 57 N. Y. Supp. 1096; *Lyman v. Stroudbach*, 47 La. Ann. 71, 16 South. 662; *Whelan v. Rossiter*, 1 Cal. App. 701, 82 Pac. 1082; *Glassman v. Condon*, 27 Utah. 463, 76 Pac. 343; *Henderson v. Beatty*, 124 Iowa 163, 99 N. W. 716; *Turner v. McDonald*, 76 Cal. 177, 18 Pac. 262, 9 Am. St. 189; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 17 Am. St. 634, 8 L. R. A. 591; *Appeal of Clouse*, 192 Pa. St. 108, 43 Atl. 413; *Herman v. Somers*, 158 Pa. St. 424, 27 Atl. 1050; *McPherson v. Schade*, 149 N. Y. 16, 43 N. E. 527.

DUNBAR, J.—Appeal from a judgment of the superior court of Pierce county, overruling defendant's demurrer to plaintiff's complaint. The action was by the vendee, Miller, on a contract for the sale of certain real estate, to recover back from the vendor, Calvin Philips & Co., the deposit of earnest money, amounting to \$600, paid by him to bind the contract, on the ground that the vendor could not furnish a good title free from incumbrances. The complaint sets forth the contract and the receipt of the money, the latter part of which is as follows:

"I hereby agree to furnish abstract of title completed down to date and to convey the above described real estate, or cause the same to be conveyed by special warranty deed, free and clear of all incumbrances to the said W. H. Miller. . . . It is agreed that if the title to said premises is not good or cannot be made good within thirty days of the date of delivery of the abstract as herein mentioned, then it shall be optional with the purchaser whether the title pass subject to any defect that may be found or the earnest money shall be refunded. But if the title to said premises is good and the conditions of this agreement are not completed by the said

W. H. Miller the earnest money shall be forfeited to us as liquidated damages. (Signed) Calvin Philips & Co."

This instrument is dated March 9, 1906. It is alleged in the complaint that, after the abstract of title was furnished, it was discovered by the plaintiff, that the Chicago, Milwaukee & St. Paul Railway Company of Washington, a corporation organized and existing under the laws of the state of Washington, had established a line of railroad through, over and across the real estate above described; that the railroad corporation was organized to build, operate and maintain railroads as common carriers, etc., and was entitled to exercise the power of eminent domain; that it had begun proceedings in the superior court of the state of Washington for the appropriation and condemnation of the land for which the plaintiff had contracted; that upon discovering the fact of location and establishment of said line of railroad across said premises and the beginning of proceedings for condemnation and the filing of *lis pendens*, the plaintiff requested defendant to make good the title within the time of thirty days as provided in the agreement of March 9, 1906; that the defendant refused to take any steps to that end, and thereupon notified plaintiff that, unless plaintiff would take said property subject to said lien and charge, and in the defective condition of its title, plaintiff would forfeit his earnest money; and thereafter the said defendant sold to other parties the said real estate, and notified plaintiff that defendant had forfeited plaintiff's earnest money. Plaintiff demanded judgment for \$600 and for costs and disbursements. The defendant moved to strike from the complaint that portion in relation to the sale to other parties of said real estate, which motion was denied, and the action of the court in that respect is alleged as error here. With the view we take of the other allegations of the complaint, however, this becomes immaterial, and its insertion in the complaint could in no way prejudice the appellant. The main contention is that

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the court erred in overruling the demurrer to the complaint, for the reason that, as is urged by the appellant, the act of the railroad company did not constitute an incumbrance. It is conceded that, if such act did constitute an incumbrance upon appellant's land; respondent was entitled to a return of his deposit, and the judgment should be affirmed.

It seems to us too plain for extended discussion that, under the allegations of the complaint, the respondent was unable to obtain that for which he contracted, and that it would be inequitable to compel him to pay for anything less. No matter what the technical definition of "incumbrance" may be, the language of the contract is plain and specific.

"It is agreed that if the title to said premises is not good or cannot be made good within thirty days of the date of delivery of the abstract . . . it shall be optional with the purchaser whether the title pass subject to any defect that may be found or the earnest money shall be refunded."

Can it be said with any degree of reason that, after the commencement of the condemnation proceedings and the filing of the *lis pendens* by the railroad company, a good title without defect could have been given by the appellant? It may be that a conveyance, any time before the condemnation proceedings culminated in vesting the title in the railroad company, would convey to the grantee the right to receive the damages allowed for the taking; but the value of the damages for the taking was not the subject of the contract; was not what the respondent expected to buy or the appellant intended to sell. Under such contract it has been universally decided that the grantee is entitled to a marketable title, to an indubitable title, and that he cannot be compelled to buy a lawsuit or a title that will involve him in litigation; but that he has a right to a title which will enable him to hold possession of his land in peace and security.

The judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5991. Decided October 27, 1906.]

LULU L. SHERIDAN, *by Tillie Hewitt, her Guardian,*
Respondent, v. MODERN WOODMEN OF AMERICA,
Appellant.¹

BENEFICIAL ASSOCIATIONS—NONPAYMENT OF DUES—EXCUSES—UNAUTHORIZED WAIVER OF BY-LAWS. Nonpayment of dues by the beneficiaries in a fraternal benefit certificate, after insanity of the member insured, is not excused by the failure of the clerk of the local lodge to give notice of assessment, after agreeing so to do, where the by-laws provide that such nonpayment, *ipso facto*, works a suspension of the member and forfeiture of the certificate, and that the clerk shall have no power to waive or change any of the provisions of the by-laws; there having been no custom on the part of the clerk to make such waiver.

SAME—INSANITY AS EXCUSE. In such a case the insanity of the member is no excuse for failure to pay assessments when due.

SAME—REFUSAL TO REINSTATE—ACQUIESCENCE AND LACHES OF BENEFICIARY OF INSANE MEMBER. The beneficiary in a mutual benefit certificate of an insane member is precluded from recovery by her own laches and acquiescence in refusal to reinstate the member, where her tender of dues was refused and returned because not accompanied by a certificate of good health, and the money was retained and no further assessments or dues paid or tendered or any steps taken to secure a reinstatement for a period of more than two years, and until after the death of the insured.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered September 16, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a mutual benefit certificate. Reversed.

Emery, Rourke & Denney (Ben. D. Smith, of counsel), for appellant.

Bostwick & Mulvihill, for respondent.

Crow, J.—Action by the plaintiff, Lulu L. Sheridan, by Tillie Hewitt, her guardian, upon a benefit certificate issued by the defendant to one Hiram D. Sheridan, now deceased.

¹Reported in 87 Pac. 127.

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Opinion Per CROW, J.

The certificate, which was issued April 19, 1900, named as beneficiary the plaintiff, Lulu L. Sheridan, minor daughter of Hiram D. Sheridan and Tillie Hewitt. At the date of the certificate Lulu's father and mother had been divorced, and her mother had subsequently married. The plaintiff contends that, during the month of December, 1901, while Hiram D. Sheridan was in good standing, he became insane; that in March, 1902, he was committed to an asylum where he remained until his death in June, 1904; that in December, 1901, on discovering such insanity, Tillie Hewitt, the plaintiff's mother, gave notice thereof by letter to the clerk of the defendant's local camp at Libby, Montana, advising him that, if Mr. Sheridan failed to pay his assessments, she wished to be notified so that she might pay for the benefit of her daughter; that in response the clerk wrote Mrs. Hewitt that Mr. Sheridan's assessments were then paid in advance, that when further assessments became due he would notify her, and that he regretted to learn of the insanity of Mr. Sheridan; that the clerk afterwards failed to notify Mrs. Hewitt of assessment No. 1, for January, 1902; that Sheridan was suspended for its nonpayment; that by reason of the failure of the clerk to notify Mrs. Hewitt, such suspension was void; that no subsequent notice was given Mrs. Hewitt, and that the certificate therefore remained in full force at the date of Sheridan's death.

The defendant claims that due notice of assessment No. 1, for January, 1902, was given to the assured by the clerk of the head camp, in the manner provided by the contract; that he failed to pay the same and became *ipso facto* suspended on February 2, 1902; that he was never reinstated; that no notice was given the defendant of the insanity of the insured prior to his suspension; that insanity is no excuse for nonpayment of assessments; and that the alleged notice of insanity and the clerk's alleged promise to inform Mrs. Hewitt of nonpayment, conferred no rights upon the plaintiff, nor

did they impose any duty upon the defendant. Prior to the commencement of this action, the plaintiff tendered to the defendant all dues and assessments which had matured between January 1, 1902, and June 1, 1904, amounting to \$27.30. This tender was refused, the defendant denying liability on the certificate. On trial the jury found a verdict in favor of the plaintiff for \$1,972.70, and from the judgment entered thereon, this appeal has been taken.

The appellant, with other assignments of error, contends that the trial court erred (1) in denying its motion for a nonsuit, and (2) in denying its motion for a directed verdict. The pleadings and evidence show, that the appellant is a fraternal mutual benefit association, organized under the laws of Illinois, with its head camp at Rock Island, and with numerous local camps throughout Illinois and other states; that it is organized on the lodge plan, having a ritualistic form of work and also certain fraternal, social and indemnity features. Hiram D. Sheridan was a member of the local camp at Libby, Montana. By the terms of his certificate, the appellant agreed in case of his death to pay to the respondent as beneficiary the sum of \$2,000, subject to certain conditions therein stated, one of which was that, if assessments against the assured should not be paid to the clerk of the local camp on or before the first of the month following the date of notice of the same, then the certificate should be null and void.

The by-laws provided, that every beneficial member who after notice should fail to pay any assessment on or before the first of the following month, or who should fail to pay dues in advance on or before the first day of April, July, October, or January, should *ipso facto* become suspended; that during such suspension his benefit certificate should be absolutely null and void; that a suspended member might be reinstated within sixty days upon payment of all arrearages, together with all fines, dues and assessments maturing subse-

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quent to default, provided that he was then in good health and furnished the clerk of the local camp a written warranty to such effect signed by himself; that a beneficiary member in suspension for more than sixty days but less than six months, if in good health, might be reinstated upon furnishing a certificate of good health from the camp physician after medical examination duly approved by the head physician, and upon payment of all arrearages; that no officer of any local camp was authorized or permitted to waive any of the provisions of the laws of the society relating to the contract for the payment of benefits; that no officer of any local camp should have the right or power to waive any of the provisions of the by-laws of the society; that the clerk of the local camp was declared to be the agent of such camp and not the agent of the head camp; that no act or omission on his part should have the effect of creating a liability on the part of the society or of waiving any right or immunity belonging to it, and that he should not collect or receive assessments or dues from a beneficiary member who has been suspended, except upon reinstatement in the manner above mentioned. All by-laws of the society were, by the express terms of the certificate, made a part thereof.

No payment of any assessments or dues maturing after December 1, 1901, was made by Sheridan, or any other person, at any time prior to his death in June, 1904, nor were any tendered, except on the one occasion hereinafter mentioned. The respondent's witnesses testified that in December, 1901, Mrs. Hewitt wrote a letter to the clerk of the local camp advising him of the insanity of Sheridan, and requesting him to notify her so that she might pay the assessments in the event of the failure of Sheridan to do so; that the clerk, answering this letter, stated the assessments were then paid in advance, and that he would keep her notified; that by reason of the failure of the clerk to give her any further notice, she failed to pay the assessment levied in January,

1902, not knowing that it had been levied; that in February, 1902, the clerk by letter advised her of the suspension of Sheridan for nonpayment of the January assessment, and sent her a blank certificate of health to be signed by him as a condition precedent to his reinstatement; that in response to this letter, she, on March 8, 1902, wrote the clerk in part as follows:

"I have been away a little while and was not here when Lulu, my daughter, got your letter or would have seen to it at once as Sheridan was here then but he is not here now and the last time I saw him, about three weeks ago, he was well and walking down the street, but as he has left town I cannot get him to sign the paper but will inclose \$3.60 to pay the dues to May 1st, and if it is not all right you can return the money order to me, . . . the reason I wish to keep up these dues is he is a very reckless man now in some ways and as I wrote you a year ago that I would keep up these dues if you would inform me when he failed to pay. . . . I hope you will look on my letter with some favor and make this all right, that is, if his insurance still runs to Lulu, his daughter."

The original of the last-mentioned letter was produced at the trial but none of the others mentioned by respondent's witnesses could be found. No further attempt at payment of either assessments or dues was made by the respondent or her mother, nor is it claimed that any further correspondence took place. The \$3.60 remitted by Mrs. Hewitt was returned by the clerk, he refusing to receive the same without the health certificate. The clerk denies receiving any letter from Mrs. Hewitt in December, 1901, and also denies that he wrote her the letter which she says she received from him during the same month, in which he promised to notify her of the assessments when levied. As the jury found a verdict in favor of the respondent, they necessarily believed the statements of her witnesses, and we must accept the same as true.

The contention of the respondent is, that the appellant had no right to suspend Sheridan for nonpayment of dues or

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assessments, he being, to appellant's knowledge, insane and unfit for business; that appellant's agent, the clerk of the local camp, failed to notify the respondent of the levy of assessments as agreed, and that, by reason of such failure, the attempted suspension was void. It is not disputed but that notice of the January, 1902, assessment was given to Sheridan by the head clerk, in the manner provided by the by-laws, and the appellant now insists that nonpayment after such notice *ipso facto* worked a forfeiture of the certificate, and that, even though the clerk of the local camp did agree to notify the respondent's mother of the assessments when levied, such agreement was not binding upon the appellant by reason of the restrictions upon his authority contained in its by-laws.

We think these contentions should be sustained upon the authority of *Modern Woodmen of America v. Tevis*, 54 C. C. A. 293, 117 Fed. 309, and cases therein cited. In the *Tevis* case the United States circuit court of appeals construed and passed upon the legal effect of the identical by-laws now before us, and we fully indorse and adopt its reasoning as controlling in this case, this being the sole instance in which it is shown that the clerk in his course of dealing with members or beneficiaries violated any by-law of the society, and it not appearing that his action was the result of any customary course of procedure adopted by him towards members or beneficiaries. A single act of transgression cannot arise to the dignity of a custom so as to be impliedly ratified by the appellant. Had it been pleaded and shown that the clerk habitually violated appellant's by-laws in this or kindred matters, a different rule might possibly be applied in determining the relative rights of the parties; but that question is not now before us, as no showing of any such state of facts has been made.

The appellant further contends that the insanity of the assured is no excuse for nonpayment under the contract, and

in support of such contention cites, with others, the following authorities, which we think are in point: *Pitts v. Hartford Life & Annuity Co.*, 66 Conn. 376, 34 Atl. 95, 50 Am. St. 96; *Wheeler v. Connecticut Mut. Life Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594; *Carpenter v. Centennial Mut. Life Ass'n*, 68 Iowa 453, 27 N. W. 456, 56 Am. Rep. 855. In following these cases, we are not unmindful of the case of *Buchanan v. Supreme Conclave etc.*, 34 L. R. A. 436 (178 Pa. St. 465, 35 Atl. 873, 56 Am. St. 774), cited by respondent, and which we regard as being against the weight of authority.

The respondent most vigorously contends that, as she was misled by the act of the clerk of the local camp, the appellant had no right to forfeit the certificate, and that it should be estopped from pleading such forfeiture. Were we to concede that the clerk had power to bind the appellant when he agreed to notify respondent's mother of assessments as levied, and should we also hold that the beneficiary was entitled to notice of assessments by reason of the insanity of the insured, of which appellant was advised, still we think no recovery can be permitted herein, as the respondent and her mother, who was acting in her behalf, must be held by their subsequent conduct, covering a period of more than two years, to have acquiesced in such alleged irregular forfeiture of the certificate. At all times after March 8, 1902, they failed to make any further tender of dues or assessments, nor did they take any steps to secure relief from such suspension and forfeiture.

In *Lavin v. Grand Lodge*, 104 Mo. App. 1, 78 S. W. 325, cited by respondent, it was contended that the wife of the beneficiary had twice tendered payment of assessments which were due, but that the clerk of the local lodge had declined to accept the same for the reason that, as he alleged, the tender was insufficient in amount. No further payments were made or tendered during the life of the assured, who died some six months later. On trial, judgment was entered in favor of the

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beneficiary, which the appellate court reversed, ordering a new trial. Upon investigation we find that, on the second trial, the beneficiary again recovered judgment, and that the case again came to the court of appeals, being reported in 112 Mo. App., 1, 86 S. W. 600. On this last hearing, the appellate court enters into a very elaborate and able discussion of the rights and duties of an assured when a certificate issued by a fraternal society has been forfeited without just cause, and announces the doctrine that it is essential for the preservation of the rights of the beneficiary under the certificate that, notwithstanding such forfeiture, the assured or his representative should offer to fully perform the contract upon his part. The court, reviewing numerous authorities, points out a clear distinction between the principles applicable to old line life insurance companies which carry on business for profit, and those which are applicable to fraternal societies. Under appellant's by-laws and the terms of the certificate, Sheridan was required to pay quarterly dues in advance, without notice of the same. There is no showing that either he or any other person ever offered to make such payments within the two years and a half that the assured lived after January, 1902. Yet the respondent and her mother, who had the certificate in her possession, must have known that nonpayment of these dues would *ipso facto* forfeit the rights of the assured, without regard to the assessments. There is no showing that, after the tender, made in March, 1902, was returned by the clerk, the assured, the respondent, or her mother ever attempted to take any steps, either in the order or in any court of justice, to compel a reinstatement of the policy, or to have the alleged forfeiture declared to be void. The appellant contends that, under the by-laws of the society, the respondent should have appealed from the action of the clerk, and that having failed to do so, she is now estopped from claiming under the certificate. Respondent, however, calls attention to the fact that the by-laws by their express terms give

the right of appeal to members only. This is true. Yet were we to hold that the respondent, by reason of her father's insanity, was, prior to his death, entitled to any vested right in the certificate as against the appellant, she certainly should have taken some action to protect herself from the loss which would necessarily result from the forfeiture alleged to be void, and should have done so without unreasonable delay. Accepting her theory of this case, we are unable to escape the conclusion that a duty was imposed upon her to at least direct the attention of the local camp to the action of its clerk, so that it might be afforded an opportunity for correcting his mistake in refusing the tender, either by taking action itself, or by causing the head camp to act. If the respondent and her representatives could be permitted to remain quiet and allow the suspension of Sheridan and the forfeiture of the certificate to continue unquestioned for the period of more than two years, without even tendering any payment of dues which necessarily matured, and could then successfully prosecute this claim against appellant, there is no reason why they could not have continued such inactivity for a period of ten years, or even longer. Such a construction of the certificate would be absurd, to say nothing of its being unjust. We think the respondent acquiesced in the decision and action of the clerk, that she is now bound thereby, and is not entitled to recover.

The motion for a directed verdict in favor of the appellant should have been granted, and the trial court erred in denying the same. It is ordered that the judgment of the superior court be reversed, and that the cause be remanded with instructions to dismiss the action.

MOUNT, C. J., ROOT, FULLERTON, HADLEY, DUNBAR, and
RUDKIN, JJ., concur.

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Citations of Counsel.

[No. 6233. Decided October 27, 1906.]

ONTARIO LAND COMPANY, *Respondent*, v. JAY YORDY *et al.*,
Appellants.¹

TAXATION—TAX DEED—VALIDITY—DESCRIPTION OF PROPERTY—ESTOPPEL OF OWNER. A tax deed of property in a "reserved" portion of a city plat, describing the same as blocks 352 and 372 in such plat, is sufficient, although there are no such blocks designated in the plat, where it appears that, adopting the conservative numbering in the plat, the "reserved" portion would have been blocks 352 and 372, and where the owner had paid no taxes on the "reserved" portion, disputed the county's right to assess the same at all, and stood by in silence after the assessment and foreclosure and permitted sale to be made thereof under such description.

SAME—TAX JUDGMENT—VACATION—TENDER OF TAX. The validity of tax foreclosure proceedings cannot be attacked by the owner without tender of the delinquent taxes.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered September 14, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover possession of real property and to quiet title. Reversed.

Ira P. Englehart and *Lee C. Delle*, for appellants, to the point that the judgment being regular on its face was not subject to collateral attack, cited: *Kalb v. German Sav. & Loan Society*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. 757; *Kizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064; *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20; *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757. The description in the tax deed was sufficient to identify the property. *Sloan v. Sewell*, 81 Ind. 180; *Fowler v. People ex rel. McCrea*, 93 Ill. 116; *Commonwealth v. Louisville*, 20 Ky. Law 893, 47 S. W. 865; *Masonic Building Ass'n v. Brownell*, 164 Mass. 306, 41 N. E.

¹Reported in 87 Pac. 257.

306; *Garwood v. Hastings*, 38 Cal. 216; *Lower Kings River Reclamation Dist. v. McCullah*, 124 Cal. 175, 56 Pac. 887; *Noyes v. King County*, 18 Wash. 417, 51 Pac. 1052; *Bosworth v. Charles Danzien*, 25 Cal. 297. The plaintiff must tender and allege tender of all taxes, penalties, etc., paid by the purchaser at the tax sale. *Merrit v. Corey*, 22 Wash. 444, 61 Pac. 171; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751; *Parks v. Watson*, 20 Fed. 764; *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Webster v. French*, 11 Ill. 254; *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643; *Hayward v. Munger*, 14 Iowa 516; *Crawford v. Liddle*, 101 Iowa 148, 70 N. W. 97; *Whelan v. Reilly*, 61 Mo. 565; *Young v. Droz*, 38 Wash. 648, 80 Pac. 810.

E. B. Preble (*Fred Parker*, of counsel), for respondent, contended, *inter alia*, that town plats should be interpreted with due regard to the common usage of words, characters, etc., used therein in order to ascertain the true intention of the party making it. *Elliott, Roads & Streets* (2d ed.), p. 131; *Duluth v. St. Paul etc. R. Co.*, 49 Minn. 201, 51 N. W. 1163; *Noblesville v. Lake Erie etc. R. Co.*, 130 Ind. 1, 29 N. E. 484; *Robinson v. Coffin*, 2 Wash. Ter. 251, 6 Pac. 41; *Columbia etc. R. Co. Seattle*, 33 Wash. 513, 74 Pac. 670; *Mt. Vernon v. Young*, 124 Iowa 517, 100 N. W. 694; *Farlin v. Hill*, 27 Mont. 27, 69 Pac. 237; *Youngerman v. Board of Supr's*, 110 Iowa 731, 81 N. W. 166; *Grant v. Davenport*, 18 Iowa 179. The filing of certificates of delinquency was a jurisdictional prerequisite to the entry of any judgment in the tax foreclosure proceedings against the property. *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267; *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Galpin v. Page*, 18 Wall. 350, 4 L. Ed. 959. No tender is necessary when no taxes are shown to be due from the plaintiff upon the identical property sought to be recovered. *First Nat. Bank v. Hungate*, 62 Fed. 548.

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CROW, J.—This action was instituted by the plaintiff, the Ontario Land Company, against the defendants, Jay Yordy and Minnie E. Yordy, his wife, to recover possession of certain city lots in North Yakima. It appears that the plaintiff's grantors, Chester A. Congdon and Clara B. Congdon, being owners of the east half of the southeast quarter of section 24, in township 13, north of range 18, E., W. M., except ten acres belonging to one Charles M. Holton, platted the same on May 16, 1889, as Capital Addition to North Yakima; that the entire tract above described was apparently platted, with the exception of the Holton ten acres; that through the central portion of the plat, which included a certain body of land marked "Reserved," and hereinafter mentioned, the blocks were consecutively numbered; that where blocks numbered 352, 353, 372 and 373 would have ordinarily appeared, a rectangular tract was shown, marked "Reserved," the same being of sufficient size to include four ordinary blocks; that no explanation was afforded, either by the dedication or upon the plat, as to what was meant by the term "Reserved," nor was the use to which said tract was to be applied declared; that the assessor of Yakima county listed and appraised for taxation what he described as blocks 352 and 372 in Capital Addition to North Yakima, Wash., and the same were taxed for the years 1892, 1893, 1894 and 1895; that all taxes for these years became delinquent; that the county foreclosed the same on blocks 352 and 372 of Capital Addition to North Yakima; that, under the foreclosure decree, a tax deed was afterwards issued to the defendant Jay Yordy; that he afterwards paid all subsequent taxes levied thereon; that on May 24, 1890, after the said Congdon and wife had platted Capital Addition, they deeded all of the land therein included to the plaintiff, the Ontario Land Company, but that instead of describing the same by lots and blocks, they conveyed it as the west half of the southeast quarter and the east half of

the southwest quarter of section 24, township 13, north of range 18, E., W. M., excepting therefrom the Holton tract; that in the deed from Congdon and wife to the plaintiff, no allusion whatever was made to Capital Addition to North Yakima; that on September 22, 1904, after the tax deed above mentioned had been executed and delivered to the defendant Yordy, and had been recorded, the plaintiff, the Ontario Land Company, platted that portion of Capital Addition marked "Reserved," as "Heerman's Addition to North Yakima," subdividing said reserved tract into four blocks numbered from 1 to 4 inclusive, each block being subdivided into sixteen lots; that Yordy had then taken possession of a portion of the tract marked "Reserved," claiming the same under his tax deed; and that afterwards the plaintiff, the Ontario Land Company, instituted this action to eject him from certain lots which it described in its complaint as being in blocks 1 and 2 of Heerman's Addition, making no reference whatever to Capital Addition or any part thereof. The trial court, after making its findings of fact and conclusions of law, entered a decree in favor of plaintiff, awarding it possession, and the defendants have appealed.

The appellants contend that they are entitled under the tax deed to that portion of the land marked "Reserved," which would, by the consecutive system of numbering used in said original Capital Addition plat, have constituted blocks 352 and 372; while the respondent insists that it has instituted this action to recover the possession of certain lots in Heerman's Addition to North Yakima, not included in the appellants' tax deed; that the tax deed in no way describes, nor does it identify, any land included either in Capital Addition or Heerman's Addition. The main issue in this case, therefore, is whether the description of the lands as blocks 352 and 372 of Capital Addition to North Yakima is sufficient in law to give validity to the deed.

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The evidence shows that the respondent had actual notice and knowledge of the fact that an attempt had been made to levy a tax upon that portion of its property marked "Reserved," and that it not only denied the validity of such taxes, in interviews with two county treasurers who called its attention to the same, but also stood quietly by, during the foreclosure proceedings and tax sale, and, with full knowledge of the same, permitted the appellant Yordy to make his purchase without its taking or making any protest, and that it thereafter platted the reserved tract as Heerman's Addition to North Yakima. It is a well-established principle of law that a description in a deed, or other instrument affecting title to real estate, is sufficient if it affords an intelligent means for identifying the property, and does not mislead. In other words, if a person of ordinary intelligence and understanding can successfully use the description in an attempt to locate and identify the particular property sought to be conveyed, the description answers its purpose and must be held sufficient. Mr. Jones, at section 323 of his treatise on the Law of Real Property in Conveyancing, says:

"The first requisite of an adequate description is that the land shall be identified with reasonable certainty, but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant. It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels."

When real estate is listed and assessed for taxation, it is ordinarily necessary that the assessment roll shall contain a

reasonably accurate description of the tract sought to be taxed. The object of this requirement is stated by writers on taxation and tax titles to be three-fold, (1) it is designed to inform the owner of the claim upon his property; (2) it is designed that intending purchasers may know what property will be offered for sale in the event of the taxes becoming delinquent; and (3) it is also the intention that under such description a proper deed may be executed to the purchaser. Cooley, Taxation (2d ed.), p. 405; Black, Tax Titles (2d ed.), § 112.

The respondent had paid no taxes on the reserved tract for the years included in the foreclosure proceedings, nor does it claim to have done so. The tract was concededly private property subject to taxation. The owner must have known that, under ordinary procedure, it would be assessed under some description. It fails, however, to show any effort upon its part, or any desire, to learn how or under what description any levy of taxes had been made. The blocks in Capital Addition were numbered in such a manner as to indicate that blocks 352 and 372 would be located on a particular portion of the reserved tract, if such blocks could be construed to exist. The entire plat fails to show any place for block numbers 352 and 372, so omitted except upon the reserved tract. This tract was in the exact location where such numbers would occur in the regular and consecutive course and system of numbers employed in the plat.

There is evidence tending to show that, for some time prior to the year 1892, this tract was used as a park by the city of North Yakima; that during said period it was not taxed; but that it was afterwards abandoned by the city. It then became the imperative duty of the county assessor to list it for taxation. He was compelled to do this under some description, so he designated the portion afterwards purchased by the appellant Yordy as blocks 352 and 372 of Capital Addition to North Yakima. Under all the circumstances,

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we think this a sufficient description to identify the property and support the assessment levy, foreclosure and tax deed. No person of ordinary intelligence could fail to correctly identify the property intended to be taxed and afterwards conveyed, and the respondent could not destroy the sufficiency of the description used, or render it ambiguous, by bringing into existence a subsequent and inconsistent description when platting the reserved tract under another name. The entire course of the respondent would seem to have been adopted with a premeditated intention to evade the payment of any taxes whatever upon the reserved tract, although at the time it knew the same was liable to taxation, and no court of justice should adopt any strained rule of construction the result of which would be to aid it in any such enterprise. It could have avoided any threatened cloud on its title or loss of its property by paying the taxes of which it had actual knowledge, and for the payment of which it knew it was justly liable. The respondent has undertaken to attack the validity of the foreclosure proceedings, doing so in response to the claim of title pleaded in appellants' answer. We do not think it can do so in this action as it has not tendered the delinquent taxes as required by Bal. Code, § 5678 (P. C. § 8733). *Ward v. Huggins*, 16 Wash. 530, 48 Pac. 240; *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171.

The judgment of the superior court is reversed, and the cause is remanded with instructions to enter a decree quieting the title of the appellants.

MOUNT, C. J., ROOT, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 6415. Decided October 30, 1906.]

THE STATE OF WASHINGTON, *on the Relation of E. A. Shores et al., Plaintiff, v. E. W. Ross, as Commissioner of Public Lands, Respondent.*¹

PUBLIC LANDS—SALES—DEED—DELIVERY—FRAUD—POWER OF COMMISSIONER TO WITHHOLD DEED. The commissioner of public lands or board of land commissioners, has the power to withhold from delivery a deed of state lands after confirmation of the sale and execution of the deed, and to direct an investigation, where it is alleged that the same has been procured by fraud, misrepresentation or collusion.

APPEAL AND ERROR—HEARING—DECISION—MANDAMUS. Upon application for a mandamus in the supreme court, an issue as to whether a deed of state lands has issued through fraud and collusion will be referred to the superior court for trial.

Application filed in the supreme court September 17, 1906, for a writ of mandate to compel the commissioner of public lands to deliver a deed to tide lands, after confirmation of sale. Remanded for further proceedings.

William H. Pratt and Walter Loveday, for relators.

The Attorney General and A. J. Falknor, Assistant, (E. M. Hayden, of counsel), for respondent.

Root, J.—This is an application for an original mandamus on the part of the relators to require respondent to deliver to relators a deed to certain tide lands near the city of Tacoma. The relator E. A. Shores made an application for the purchase of these tide lands on the 9th day of January, 1906, making the necessary legal deposit. Said application stated that said lands were not occupied, and that there were no improvements thereon. Thereafter, a certificate of appraisal of the land was made out and filed and the land ordered sold. The usual notice of sale was given, as required by law, and the land sold to the relator E. A. Shores at public auction

¹Reported in 87 Pac. 262.

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on the 30th day of June, 1906, for a little more than the appraised valuation. The auditor of Pierce county made his report on the sale, and said relator paid the purchase price, and the board of state land commissioners confirmed the sale. On the 29th day of August, 1906, a deed was regularly made out and signed by the governor and attested by the secretary of state with the seal of the state attached thereto. Before said deed was delivered to relators, affidavits were filed in the office of the commissioner of public lands alleging that there were valuable improvements upon said tide lands, and it was charged that said relator had entered into collusion with other parties to stifle bidding at the time said lands were sold at public auction. Thereupon the said land commissioner, this respondent, referred said affidavit and the application and all the records, and matters thereto appertaining, to the board of state land commissioners, which board, on the 17th day of September, 1906, entered an order disapproving of said sale, and directing the commissioner of public lands to cause a reinspection of said lands to be made.

In answer to the application for the writ, respondent sets up all of these transactions and maintains that it is his duty, in order to protect the state from fraud and imposition, to decline to deliver said deed, and that, under the circumstances, he or the state board should withhold said deed until an investigation can be made as to the charges of fraud and misrepresentation preferred against the relator who made the application. Relators insist that neither the respondent nor the board of state land commissioners has any jurisdiction to make such an investigation, that their power over the subject-matter ceased when the deed was signed and attested by the governor and secretary of state. They insist that the power of these officials is thus limited by § 2198 of Bal. Code (P. C. § 8236), which reads as follows:

“The board of appraisers or commissions, or commissioner of public lands, shall have the right to review and to recon-

sider any of its official acts relating to lands of the state until such time as a lease or contract for purchase of any of said lands shall have been made, executed and signed by the commissioner of public lands or by the board itself."

Respondent contends that the expression "made, executed and signed" is equivalent to the words "made, executed and delivered" which are commonly found in deeds of conveyance, and urges that the deed is not "made and executed" until it is drafted, signed, acknowledged, and delivered, and that it was not the intention of the legislature to deprive the officers of the state of the power to deal with the subject as long as the deed was not actually delivered. Whether this contention of respondent can be upheld in its entirety we are not now called upon to decide; but we think that his position is tenable to the extent that the land commissioner, or the board of state land commissioners, may at any time refuse to deliver a deed when matters are brought to his or their attention which give reason to believe that said deed is being obtained by means of fraud. Fraud vitiates whatever it touches, and relators can insist upon no action by state officials when the grounds of their demand are based upon fraudulent transactions. It is the duty of these state officers to protect the state against imposition. The Laws of 1903, page 113, § 3 (Pierce's Code, § 8178a), provides:

"Any sale or lease of state lands made by mistake, or not in accordance with law, or obtained by fraud or misrepresentation shall be void, and the contract of purchase or lease issued thereon shall be of no effect, but the holder of such contract or lease shall be required to surrender the same to the commissioner of public lands, who shall, except in the case of fraud on the part of the purchaser, cause the money to be refunded to the holder thereof, . . ."

If the deed to these tide lands had been delivered after the respondent was reliably informed that the application and bidding were fraudulent, to the detriment of the state, it would be the duty of the respondent, or of some official of

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the state, to immediately cause an action to be brought to cancel said deed, and to recover the property, title to which was thus fraudulently acquired. 26 Am. & Eng. Ency. Law (2d ed.), 397 and note 1; 19 Am. & Eng. Ency. Law (2d ed.), 754-757, and notes. This being true, it follows that the delivering of the deed to relators would be an idle ceremony. It is an accepted maxim that the law never requires the doing of a useless thing. We cannot think that the legislature intended to deprive the commissioner of public lands, or the board of public land commissioners, of authority to examine into charges of fraud preferred under circumstances such as surround this case. The great volume of business transacted in the office of the commissioner of public lands makes it impossible for the respondent, or other members of the board of state land commissioners, to be at all times personally familiar with the condition of every tract of state land with which they have to do, and with the circumstances surrounding every sale, and it is certainly not the policy of the law that they should be handicapped in the exercise of functions necessary to the state's protection. We hold that, at any time prior to the actual delivery of the deed of conveyance, these officers, or any of them, may refuse to deliver a deed when *bona fide* charges of fraud are properly interposed, or when they themselves are in any way apprised of facts which afford them good reason to believe that the applicant has been guilty of fraud to the detriment of the interests of the state.

The relators have filed herein an affidavit asserting that there were no improvements, within the meaning of the law, upon these tide lands at the time said application was made, and deny that there was any collusion in the matter of the bidding at the public auction. This raises issues of fact which this court cannot conveniently determine. Respondent, in his answer, prays that the action be dismissed, or that it be referred to some superior court to take evidence and re-

port the facts to this court. If the relators have been guilty of no misrepresentation or fraud, they should be allowed to receive the deed to these lands, and the same should not be again offered for sale. We therefore think that it is but fair that the facts should be ascertained and reported to this court, whereupon an appropriate disposition will be made of the case.

It is therefore ordered that the superior court of Pierce county be, and it is hereby, authorized and directed to take evidence upon the questions of misrepresentation, collusion and fraud presented in this proceeding, and to make a return of the evidence and its findings thereupon to this court in due form and time. Either party hereto may call the matter on for hearing before said court, upon ten days notice in writing, duly served on the other side. Costs in this court, and in said superior court, to abide the final decision herein.

MOUNT, C. J., DUNBAR, CROW, HADLEY, and FULLERTON, JJ., concur.

RUDKIN, J., dissents.

[No. 6373. Decided October 30, 1906.]

W. G. HELLAR *et al.*, Respondents, v. THE CITY OF TACOMA,
*Appellant.*¹

MUNICIPAL CORPORATIONS—CONTRACT FOR LOCAL IMPROVEMENTS—
TIME OF PERFORMANCE—VALIDITY. Under a city charter and contract for improving a street, providing for a demurrage of \$25 per day if the work is not completed within one hundred and twenty days after execution of the contract, and that the work shall be completed within one hundred and sixty days, and the contract void and all pay forfeited for failure "on the part of the contractor" to complete the same within such time, the contract is not avoided by failure of the contractor to complete the work within such time, where he delayed the work for some months after it was nearly completed, at

¹Reported in 87 Pac. 130.

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Citations of Counsel

the direction of the commissioner, and for the benefit of the city, the work being required to be done under the direction and to the satisfaction of the commissioner; since the delay was not due to the "failure of the contractor."

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 16, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to annul a local improvement assessment. Reversed.

C. M. Riddell, R. E. Evans, and J. A. Quick, for appellant, to the point that a substantial compliance with the contract is sufficient, cited: *McCartan v. Trenton*, 57 N. J. E. 571, 41 Atl. 830; *Lake Erie etc. R. Co. v. Walters*, 13 Ind. 275, 41 N. E. 465; *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *Mayor etc. of Baltimore v. Raymo*, 68 Md. 569, 13 Atl. 383; *State ex rel. Barber Asphalt Paving Co. v. McCardy*, 87 Minn. 88, 91 N. W. 263; Elliott, Roads and Streets (2d ed.), § 414; *Wheless v. St. Louis*, 90 Mo. App. 106; *Neosho City Water Co. v. Neosho*, 136 Mo. 498, 38 S. W. 89; *Levi v. Coyne*, 22 Ky. Law 492, 57 S. W. 790; *Whitfield v. Hipple*, 11 Ky. Law 386, 12 S. W. 150. The acceptance of the work by the city engineer, and the approval by the city council, was conclusive upon the property holders in the absence of fraud or palpable mistake. *Haley v. Alton*, 152 Ill. 113, 38 N. E. 750; 2 Cooley, Taxation, pp. 1280, 1281; *Fitzgerald v. Walker*, 55 Ark. 148, 17 S. W. 702; *Whitefield v. Hipple* and *Wheless v. St. Louis*, *supra*; *Dixon v. Detroit*, 86 Mich. 516, 49 N. W. 628; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 51 N. E. 453; *Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70; *Elma v. Carney*, *supra*; *Berry v. Tacoma*, 12 Wash. 3, 40 Pac. 414; *White v. Tacoma*, 20 Wash. 361, 55 Pac. 319; *Motz v. Detroit*, 18 Mich. 494, 515; Cooley, Taxation (3d ed.), pp. 671, 672; Elliott, Roads and Streets (2d ed.), §§ 442, 443; *Wyckoff v. Meyers*, 44 N. Y. 143; *Lake Erie etc. R. Co. v. Walters*, 13 Ind. App. 275, 41 N. E. 465; 15 Am. & Eng. Ency. Law

(2d ed.), § 1046; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; 1 Dillon, *Municipal Corporations* (4th ed), §§ 94, 95; *In re O'Brien*, 119 Mich. 540, 79 N. W. 1070. The act of 1905, Laws 1905, p. 281, makes the confirmation of the assessment roll by the city council final "unless it shall be made to appear that the city authorities did not act in good faith and did not attempt to act fairly in regard thereto." *Olympia Water Works v. Thurston County*, 14 Wash. 268, 44 Pac. 267. Even when the right of review on appeal is a constitutional right, the limitations thereof are necessarily fixed by legislative enactment. Elliott, *Appellate Procedure*, §§ 76-78; *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096; *McClain v. Williams*, 10 S. D. 332, 73 N. W. 72, 43 L. R. A. 287; *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263; *McCoy v. Able*, *supra*. The act of 1905 limiting the right of review is valid. Cooley, *Constitutional Limitations* (4th ed.), 371; 8 Cyc. of Law & Procedure, 1024, 1025; Freeman, *Void Judicial Sales*, p. 138, § 62; *Donley v. Pittsburg*, 147 Pa. St. 348, 23 Atl. 394; *Richman v. Supervisors*, 77 Iowa 513, 42 N. W. 422, 14 Am. St. 308, 4 L. R. A. 445; Elliott, *Roads and Streets* (2d ed.), §§ 423-424; *Hutcheson v. Storrie*, 92 Tex. 685, 48 S. W. 785; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364.

T. L. Stiles, for respondents, contended, *inter alia*, that time being made the essence of the contract, there was no authority to extend the time of performance thereof. *Beveridge v. Livingstone*, 54 Cal. 54; *Turney v. Dougherty*, 53 Cal. 619; *Mahoney v. Braverman*, 54 Cal. 565; *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427; *Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. 672; *Raisch v. San Francisco*, 80 Cal. 1, 22 Pac. 22; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972; *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844; *Palmer v. Burnham*, 120 Cal. 364, 52 Pac. 664; *Kelso v. Cale*, 121 Cal. 121, 53 Pac. 353. Where time is made of the essence of the contract, a

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failure to complete the work within the time limited is fatal to assessments levied to pay for work done. *Rose v. Tres-trail*, 62 Mo. App. 352; *McQuiddy v. Brannock*, 70 Mo. App. 535; *New England Safe Dep. & Trust Co. v. James*, 77 Mo. App. 616; *Springfield v. Davis*, 80 Mo. App. 574; *Whittmore v. Sills*, 76 Mo. App. 248; *Shoenberg v. Heyer*, 91 Mo. App. 389; *Winfrey v. Linger*, 89 Mo. App. 159; *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460; *Barber Asphalt Paving Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043; *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046; *Smith v. Westport*, 105 Mo. App. 221, 79 S. W. 725; *Spalding v. Forsee*, 109 Mo. App. 675, 83 S. W. 540; *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062; *Schibel v. Merrill*, 185 Mo. 534, 83 S. W. 1069; *Wickwire v. Elkhart*, 144 Ind. 305, 43 N. E. 216.

MOUNT, C. J.—This appeal is from an order of the superior court of Pierce county, adjudging a contract between the city of Tacoma and the Barber Asphalt Paving Company void, and for that reason annulling an assessment made by the city to pay for certain street improvements made under the contract. The city appeals.

The facts are that the city of Tacoma, in the year 1905, passed a resolution and ordinance, providing for the paving of certain streets and alleys in said city, designating the district as "improvement district No. 252." These improvements were ordered to be made at the expense of the property specially benefited thereby, payment to be made to the contractors in bonds which were to mature annually for a period of years. The commissioner of public works was directed to prepare plans and specifications and make estimates of the cost of the improvements, and to call for bids for the work. This was done, and upon public advertisement a contract was let to the Barber Asphalt Paving Company, and duly signed on March 29, 1905. By the terms of this contract and the specifications which were made a part thereof,

the work was to be completed within one hundred and sixty days after the execution of the contract, which provided:

"If said improvements be not completed within one hundred and twenty days after the execution of this contract, a demurrage will be charged as hereinafter set forth, but due allowance will be made for such days that rain prevents the execution of this work in a proper manner. The commissioner of public works shall decide the number of days to be allowed. Said time, however, shall not extend beyond the one hundred and sixty day limit."

The demurrage provided for was \$25 per day after one hundred and twenty days. The contract also provided that the work should be done under the supervision and to the satisfaction of the commissioner of public works. The paving company, after making the contract, entered upon the work, and continued to perform the same until about the 13th day of July, 1905, when the paving company was directed by authority of the commissioner of public works to cease work until other pavement which was being done in other districts adjoining district No. 252 could be brought up and fitted and connected to this work. In obedience to this request, the paving company ceased work on this contract until about September 14, 1905. The one hundred and sixty-day limit expired on September 5, 1905. On the next day these respondents served written notice on the commissioner of public works that the time limit for the completion of the contract had expired, and demanded that he permit no further work by the paving company upon said contract, and that the commissioner of public works proceed to let a contract for the completion of the work. The commissioner of public works paid no attention to this notice, but permitted the paving company to finish the work on or about the 14th and 15th days of September, and thereafter accepted the completed work.

Subsequently an assessment roll was prepared, assessing the property of respondents and others specially benefited, for the payment of the cost of the improvement, viz., \$105,-

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450. The respondents, representing property in the district assessed for about \$41,000, appeared before the city council and objected to the assessment upon several grounds. All the objections were heard and considered by the city council and rejected. Respondents thereupon appealed to the superior court of Pierce county, but upon such appeal waived all of their objections except two, which are substantially as follows: That the charter provisions as to the time within which work must be done are mandatory and binding on all the parties, and the work not having been done within one hundred and sixty days, the contract is void; that the demurrage of \$25 per day must be enforced against the contractor after one hundred and twenty days, even if the work was completed within the one hundred and sixty-day limit.

Upon trial to the court without a jury, the court found that the contract had not been completed within one hundred and sixty days as therein provided, and was therefore void; and concluded that the city of Tacoma had no power to levy an assessment for work done under the contract, and entered a judgment annulling the assessment in so far as the same affects the respondents' property.

The question in this case is, did the commissioner of public works have authority for any reason to stop the work under the contract, and thereby extend the time when the work should be finally completed? Respondents contend that he had no such authority. Appellant, while contending for the affirmative of the question, also insists that the work was substantially completed when it was stopped by the commissioner of public works; the facts in this respect being that the whole contract contained about forty thousand square yards of paving which had all been done except about eight hundred and thirty-six square yards, or, as is claimed by the respondents, about one thousand four hundred and sixty-four square yards, which uncompleted work was at several street intersections. It was claimed that these intersections could

not be completed so as to make a good job until other work should be done on the intersecting streets, and that it was for the benefit of the city that the work was stopped in its incomplete state.

Under the view we take of the main question in the case, it will not be necessary to decide or to discuss the question of substantial performance. The city charter of Tacoma provides at § 160, that all public work authorized by the city council shall be done by contract under the supervision of the commissioner of public works; but before awarding any contract, the commissioner of public works shall cause notice to be given inviting sealed proposals therefor. Section 164 provides that the notice shall contain a general description of the work to be done, the materials or supplies to be furnished, and the time within which the work is to be commenced and when to be completed, and shall refer to the plans and specifications on file in the office of the commissioner of public works for full details of the work. Section 165 provides that all contracts shall be drawn under the supervision of the city attorney and shall have attached thereto detailed specifications of the work to be done, which shall be referred to and made part of the contract; that every contract entered into by the commissioner of public works shall be signed by him and by the other contracting party, and that,

“ . . . the contract for work shall specify the time within which the work shall be commenced and when to be completed as was specified in the notice inviting proposals therefor. In case of failure on the part of the contractor to complete his contract within the time fixed, his contract shall be void, and the city shall not pay or allow him any compensation for work done by him under said contract.

“Sec. 166. If the contractor does not complete his work within the time limited therein, said *commissioner of public works* may reject the unfinished portion of said work after pursuing the formalities hereinbefore prescribed for the letting of the whole.

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"Sec. 167. The work in this article provided for must be done under the direction and to the satisfaction of the said *commissioner of public works*, and all materials and supplies furnished must be in accordance with the specifications and to *his* satisfaction. When any contract shall have been completed and accepted by *him*, he shall so declare, and thereupon *he* shall deliver to the contractor a certificate to that effect."

The contract entered into by the Barber Asphalt Paving Company and the commissioner of public works substantially followed the provisions of the charter above set out. The language of the contract in this respect is as follows:

"Said contractor agrees to construct and complete said improvement in accordance with the plans and specifications heretofore prepared by the city engineer of said city, and in pursuance of the terms of a resolution adopted by the city council of the city of Tacoma, on the 25th day of January, 1905, ordering said improvement to be made, and ordinance No. 2321 of the city of Tacoma, and in strict accordance with and conforming to the drawings, plans and specifications for said improvement filed in the office of the commissioner of public works of the city of Tacoma on the 27th day of January, 1905, a copy of which said plans and specifications are hereto attached, marked Exhibit "A," and made a part of this agreement. The work hereby contracted for shall be commenced within ten days after the signing and execution of this contract, and the whole of said materials and supplies shall be furnished and said work completed within one hundred and sixty days after the execution of this contract; but if said improvement be not completed within one hundred and twenty days after the execution of this contract, a demurrage will be charged, as hereinafter set forth, but due allowance will be made for such days that rain prevents the execution of this work in a proper manner. The commissioner of public works shall decide the number of days to be allowed; said time, however, shall not extend beyond the 160-day limit. In case the contractor fails to complete the work within one hundred and twenty days after the execution of the contract, he shall pay to the city of Tacoma, as pen-

alty for damages caused by such delay the sum of \$25 per day for each and every day that shall elapse after the said one hundred and twenty days until said work is completed; provided, that in no event shall the final time for the completion of said work extend beyond one hundred and sixty days after the execution of said contract, and if said work be not completed and said contract finished and complied with on or before the said final limit of one hundred and sixty days after the signing and execution of this contract, then, and in that event, said contract shall be void, as provided by § 165 of the city charter, and all rights and claims under the provisions of this contract forfeited by the said contractor, and in that event the said contractor shall not be allowed or paid any compensation; provided, however, that if the contractor be delayed by the city council or officials in the beginning of this work, or in any case any allowance for rainy weather be made in writing by the commissioner of public works, then the time of such suspension or delay shall be added to the said one hundred and twenty-day limit above-mentioned, but in no event shall said suspension or delay extend the time for the completion of the work under this contract beyond the said limit of one hundred and sixty days, above-mentioned, for the final completion of the work."

It is claimed that these provisions of the city charter and contract are mandatory. We may readily concede that they are so, and that they control both the contractor and the city officials in regard to the work which is to be performed under the provisions thereof. But, in order to arrive at a correct understanding of their scope and meaning, we must consider the object for which they were enacted as well as the language used. The provisions that the contract shall specify the time within which the work shall be completed and that the failure of the contractor to complete the work in the time fixed shall render the contract void, were clearly for the benefit of the city, and were intended to prevent unnecessary delays and failure on the part of the contractor to diligently prosecute the work. They were not intended to guard against delays caused by the city or the commissioner of public works and

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thereby become a trap for the contractor. The charter does not prescribe any fixed time within which work shall be done. That is left to the commissioner of public works, who fixes the time when he prepares the plans and specifications. This time ~~limit~~ fixed by the commissioner of public works is required to be put ~~into~~ the contract which is signed by him and the contractor, and, in case of failure *on the part of the contractor* to complete his contract ~~within~~ the time fixed, the contract shall be void. The charter also provides that the contractor shall perform his work under the direction and to the satisfaction of the commissioner of public works. These provisions do not mean that, where the failure is entirely on account of the city or the commissioner of public works, the contract and work done thereunder shall be forfeited. Such construction would not be placed upon the charter or upon the contract unless the language used clearly and unequivocally so states. It does not do so. It refers entirely to the *failure of the contractor*. The power to fix the time for completion of the work rests with the commissioner of public works. He fixes the time which seems to him adequate, and invites bids accordingly. Bids are made on that basis by persons who are willing to enter into a contract to complete the work under the direction and to the satisfaction of the commissioner of public works within the time fixed, and provides that a failure *on the part of the contractor* to complete the work within the time fixed shall avoid the contract, but neither the charter nor the contract provides that the contract shall be void on account of any acts of omission or commission of the commissioner of public works.

In this case it is shown without dispute that the work was nearly completed well within the time, and that the contractor could have performed his work within the one hundred and twenty days, and that he would have done so but for the request of the commissioner of public works that the work cease until certain other work in other districts was done;

that the commissioner of public works stopped the work for the benefit of the city, in order that the work might be finished better a little later than it could be done at that time. The good faith of city officials in charge of the work is not attacked. Under these circumstances, we see no good reason for holding the contract void.

Counsel for respondents cites a number of cases where the contract was extended after the time limit had expired, and after the contract had become void, and it was there held that the contracts became void at the expiration of the time limit, and that there was no power to revive a void contract after that time. Those cases were clearly right. If the contractor in this case, without the direction of the commissioner of public works or in violation of his orders, had permitted the one hundred and sixty-day limit to expire, his contract no doubt would in that case have become void according to the express terms of the charter and the contract, and no power is vested either in the city or in the commissioner of public works to revive the same, and the authorities cited would in such cases be in point. But, because the contractor obeyed the direction of the commissioner of public works, as he was obliged to do, while his contract was yet in force and still alive, this case is not controlled by the cases cited. We are of the opinion that the commissioner of public works was authorized to stop the work at any time before the expiration of the limit, in good faith for the benefit of the city, and that such time lost without the fault of the contractor should not be considered to avoid the contract. For this reason the lower court erred in holding the contract void, and in annulling the assessment roll.

The judgment of the trial court is reversed, and the cause remanded with directions to the lower court to dismiss the appeal of the city council and to affirm the assessment roll.

RUDKIN, DUNBAR, CROW, ROOT, FULLERTON, and HADLEY. JJ., concur.

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[No. 6277. Decided November 1, 1906.]

NORTHWESTERN LUMBER COMPANY, *Respondent*, v. THE CITY OF ABERDEEN, *Appellant*.¹

MUNICIPAL CORPORATIONS — DIVERSION OF FUNDS — LIMITATION OF ACTIONS. An action against a city for the wrongful diversion of local improvement funds by the payment of warrants out of their order, is not barred until three years after the holders of warrants discover the diversion; and the holder is not bound to take notice of city records showing such diversion, where the city treasurer is required, and failed, to give notice when funds were in his hands; especially within the time that the city might collect such funds.

SAME—NOTICE—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the holder of warrants had no notice of the city's misappropriation of a special fund by the payment of warrants out of order, where the manager's positive statement is that he did not examine the warrant register and had no notice of payment out of order, although it appears by his letter that some of the city records were examined, upon an attempt by him to obtain a partial payment which was refused for want of funds.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered February 15, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action against a city for the wrongful diversion of a special fund for local improvements. Affirmed.

R. E. Taggart, for appellant.

Austin E. Griffiths, for respondent.

MOUNT, C. J.—Respondent recovered a judgment for damages against the city of Aberdeen on account of certain special assessment warrants, because certain other warrants issued subsequently on the same fund had been paid out of order, leaving insufficient funds to pay the warrants held by respondent. The city appeals, alleging that the court erred

¹Reported in 87 Pac. 260.

in refusing to find that each of the causes of action set out in the complaint was barred by the statute of limitations, and that there were prior warrants outstanding on one fund greater than the amount misappropriated from such fund. There is no dispute in the testimony, and the trial court found, that the respondent had no knowledge or information, until the 25th day of November, 1902, that the city had misappropriated any of the money collected into the special assessment fund; but also found,

“ . . . that at the time of the payment of warrants out of order as set forth in the complaint, such payments were recorded in the warrant register of said city, and that the warrant register was a public record of said city and at all times open to the inspection of said plaintiff; that the defendant at no time concealed or misrepresented any of its transactions in relation to the payment of said warrants.”

The funds were collected and misapplied in 1891. This action was not begun until October 5, 1905, which was within three years after actual notice to the respondent that funds had been misappropriated. Appellant contends that, under the finding copied above, the court should have dismissed the action because the respondent was bound to take notice of the public records; but we held in *Hemen v. Ballard*, 40 Wash. 81, 82 Pac. 277, where the same question was presented, that if the action was begun within three years after the actual notice it was in time. This rule, of course, is based upon the fact that the city treasurer is required to give notice to warrant holders when funds are in his hands to be paid out, upon warrants issued against such funds, and that warrant holders are therefore not required to take notice of the records or the misappropriation of such funds, especially within the time the city under the law may collect such funds into its possession. *Potter v. Whatcom*, 20 Wash. 589, 56 Pac. 394, 72 Am. St. 135; *Gove v. Tacoma*, 26 Wash. 474, 67 Pac. 261; *New York Security & Trust Co. v. Tacoma*, 30 Wash. 661, 71 Pac. 194; *Gove v. Tacoma*, 34 Wash. 434, 76 Pac. 73.

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Appellant also contends that the respondent had actual notice in 1894, by reason of a letter dated April 19 of that year, which letter was written by the respondent to the city and contained this statement:

"We learn on examination of your city records that there is money in some of your special funds on which we hold warrants, and that the warrants which we hold are next in order of payment, but that the money in these funds is not sufficient to take up any one warrant that we hold against such funds, and your treasurer declines to indorse a partial payment on any warrant, the reason given being that he would be without the necessary voucher to turn over to his successor in office on demand," etc.

While this letter states that respondent had examined the city records, it does not say that respondent had examined the warrant register, which appears to have been the only record which showed the wrongful payment. Upon the positive statement of respondent's manager that this register was not examined, and that no notice of the payment of warrants out of order was had until 1902, we think the court was justified in finding as a fact that no notice was received by respondent until that time. We find no evidence in the record sufficient to justify the contention that there are prior warrants outstanding on the B street fund, greater in amount than the money misapplied from said fund.

There is no error in the record, and the judgment is therefore affirmed.

ROOT, DUNBAR, CROW, and HADLEY, JJ., concur.

[No. 6414. Decided November 1, 1906.]

GEORGE BIRD, *Respondent*, v. HENRY WINYER *et al.*, and
J. H. McDONALD, *Administrator of the Estate of*
*Frank Winyer, Deceased, Appellants.*¹

JUDGMENT—RES ADJUDICATA—ESTOPPEL. While a judgment quieting title to a portion of a tract of land is not *res adjudicata* as to the balance of the tract, yet where the parties to another action to quiet title to the balance are the same, the issues the same, and the evidence would be the same as in the former action, the judgment therein operates as an estoppel against the assertion of title determined by such judgment.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 10, 1906, in favor of the plaintiff, upon sustaining a demurrer to the affirmative defense in the answer, in an action to quiet title. Affirmed.

Chas. Bedford, for appellants.

Geo. T. Reid and *Jas. J. Anderson*, for respondent.

PER CURIAM.—The complaint in this action alleges that the plaintiff was formerly a member of the Puyallup tribe or band of Indians, residing on the Puyallup Indian reservation in this state; that on the 30th day of January, 1886, there was allotted and patented to him, as the head of a family consisting of himself and wife, certain lands particularly described in the complaint; that such allotment was made and patent issued pursuant to the 6th article of the treaty between the United States and the Puyallup and other Indians, concluded on the 26th day of December, 1854; that said land is timber land, wholly unfit for cultivation, and is unoccupied; that the plaintiff and Mary Bird, his wife, resided on other lands embraced in said patent until the death of the latter on the 15th day of August, 1887; that said Mary Bird left surviving her two sons by a former marriage,

¹Reported in 87 Pac. 257.

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both of whom were adults at the time of the issuance of the aforesaid patent, and lived with their families on allotments of their own; that the defendants herein are the heirs at law of the said Mary Bird, deceased, and as such claim an interest in the lands and premises described in the complaint; that such claim is without warrant or authority of law, and that the restrictions upon the alienation of the lands described in said patent were removed on the 3d day of March, 1903. A copy of the patent is attached to the complaint, and the prayer is for judgment removing a cloud and quieting title.

The answer denies that the claim of the defendants is without right, and alleges affirmatively, that the Interior Department, of the United States, in dealing with the Puyallup Indians under the above treaty, has always construed said treaty, and the patents issued thereunder, as conveying the legal title to the lands described in each patent to the individuals therein mentioned as a family, in equal portions, the husband and wife taking their portion as community property; that pursuant to said treaty and the act of March 3, 1893, the President of the United States appointed a commission of three persons, whose duties and instructions under the law were to ascertain and determine the ownership of the above lands and other lands on said reservation; that said commission did proceed to ascertain and determine the ownership of said lands and found and determined that the defendant Henry Winyer was the owner of a one-fourth interest therein, that Frank Winyer, for whose estate the defendant McDonald is administrator, was the owner of a one-eighth interest therein, that one Lilly Winyer, since deceased, was the owner of a one-eighth interest therein, and that the plaintiff herein was the owner of a one-half interest therein, that such finding and determination was reported to the secretary of the interior and by him approved, and that a large portion of the lands on said reservation have

been sold, and more than \$100,000 in money paid out and distributed under said treaty and patents construed as aforesaid. The court sustained a demurrer to the affirmative defense in the answer, found the facts as alleged in the complaint *and the affirmative defense*, and entered judgment according to the prayer of the complaint. From this judgment the defendants appeal.

The case of *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178, is decisive of this case, but the appellants maintain that the case cited was overruled in part by *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, and should now be overruled in its entirety. They further maintain that the judgment in the former action is not *res adjudicata* in this. The only difference in the two cases lies in the fact that the former action was brought to quiet title to that portion of the land, described in the patent, which was in Pierce county at the time that action was commenced; whereas, the present action is brought to quiet title to that portion of the land, described in the same patent, which was in King county at the time the former action was commenced, but is now in Pierce county by reason of a change in county lines. The subject-matter of the two actions was, therefore, not the same, and the former judgment is not *res adjudicata* here. However, the parties were the same, the issues were the same, and the evidence that would sustain or defeat the former action would also sustain or defeat the present. It was adjudged in the former action that Mary Bird, the deceased wife of the respondent, had no interest in the lands described in said patent at the time of her death, and that the defendants in said action as her heirs at law took nothing and could claim no interest therein; and under all the authorities such former judgment operates as an estoppel against the claim of title asserted by the defendants in this action, they being the same or in privity with the defendants in the former action. *Cromwell v. The County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Freeman*, Judgments (4th ed.), § 253 *et seq.*

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Syllabus.

We recognize the fact that the judgment in the former action is not technically before us as it was not pleaded, but the appellants have directed our attention to it and ask us to overrule it. Should we overrule that case, reverse the judgment in this, and remand the cause for further proceedings, it would only be necessary for the respondent to bring the former judgment properly to the attention of the trial court in order to defeat any conclusion we might reach. It may be claimed that we should direct a final judgment in favor of the appellants on reversal, but, inasmuch as the respondent was justified in relying upon the former opinion of this court in preparing and submitting his case, we would not be justified in adopting such a course. If the case should be reversed at all, it should be remanded for further proceedings in the court below. The only effect of a reversal would be to establish a rule affecting the rights of parties not now before the court, and this we decline to do.

The judgment in this case is therefore affirmed, on the authority of *Bird v. Winger*, *supra*, without expressing any opinion on the questions presented and discussed in the appellants' brief.

[No. 6393. Decided November 1, 1906.]

JOSEPH LANG, *Respondent*, v. CRESCENT COAL COMPANY,
Appellant.¹

MINES AND MINERALS—CONTRACT—PERFORMANCE TO SATISFACTION OF ENGINEER. In an action upon a contract to construct a 350 foot slope in a mine to the satisfaction of defendant's engineer, the evidence is sufficient to show that it was done to the engineer's satisfaction, where it appears that a dispute arose upon the completion of the first 75 feet, which was unsatisfactory, whereupon the plaintiff stopped work until the differences were settled, and finished the balance of the work as directed by the engineer, and there was evidence that the defendant agreed to accept the first 75 feet before defendant went back to work.

¹Reported in 87 Pac. 261.

PLEADING—VARIANCE. An allegation that the defendant accepted the work is sufficient to admit proof that the same was done to the satisfaction of defendant's engineer as required by a written contract.

APPEAL—HARMLESS ERROR—AMENDMENT. Error in overruling a demurrer to a complaint for failure to allege an essential matter is not prejudicial where evidence thereon was introduced and the same was the principal issue in the case; as the court will consider the complaint amended to conform to the proof.

Appeal from a judgment of the superior court for Lewis county, McCredie, J., entered March 6, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for breach of contract. Affirmed.

Ira A. Town and Maurice A. Langhorne, for appellant.

MOUNT, C. J.—The respondent brought this action to recover a balance alleged to be due upon a contract for the construction of a slope in appellant's coal mine. The complaint sets out the contract, and alleges,

"that the plaintiff entered upon the performance of said work under said contract on the 20th day of May, 1904, and continued therein until the 7th day of November, 1904, when the same was completed, and that the said work was by the defendant and its agents accepted and the same ever since has been and now is in the possession of the defendant, who, through its agents and employees, has worked and occupied the same; . . . that said slope was sunk the distance of three hundred and fifty feet as provided in said contract."

The complaint then alleges the amount due after deducting certain payments. The contract contained the following clause:

"It is understood and agreed that said work shall be performed under the direction and to the satisfaction of the mine superintendent of said second party, S. O. Ewing; provided, however, if any disagreement arises as to the character or completion of the work it shall be referred to a competent mining engineer to be agreed upon by the parties hereto."

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A demurrer was filed to this complaint, and overruled, and answer was then filed, admitting the contract but alleging that the work was not performed to the satisfaction of the defendant's superintendent; and, as an affirmative defense, alleged that the respondent failed and refused to construct said slope as required by said superintendent, but so constructed the same that it contained a crook or curve, to defendant's damage in the sum of \$1,500. The answer also alleged that the defendant had overpaid the plaintiff in the sum of \$524.27; and prayed for judgment against the plaintiff for the amount of damages and excess payment above stated. The reply denied the allegations of the answer. The cause was tried to the court without a jury. Findings were made in favor of the plaintiff, and a judgment entered for the amount of \$1,434.53.

The appellant assigns error of the trial court in overruling the demurrer to the complaint, and in admitting certain evidence tending to show a waiver of the terms of the contract, and in making certain findings and in refusing to make findings proposed by the appellant. The respondent has not appeared in this court, and has not filed a brief in the case. Upon a careful examination of the record, we find that the principal issue tried was whether the superintendent was satisfied with the work as it progressed. The undisputed evidence is, that the superintendent was present from the beginning of the work; that, when the slope had been constructed a distance of about seventy-five feet, the said superintendent called the attention of respondent to the fact that the slope was not being constructed on a straight line, but was making a bend to the right. After some dispute between the respondent and the superintendent as to the proper way to construct the slope to a straight line, the respondent stopped the work and removed his tools from the slope. The superintendent thereupon notified the respondent that they should employ a mining engineer under the terms

of the contract to adjust the dispute. Respondent refused to do this. Thereupon the president of the appellant intervened, and it was finally agreed between respondent, the president, and the superintendent of appellant company that respondent should continue the work and finish the same upon lines furnished by the superintendent, which was done, and the slope was completed on November 7, 1904. No objections were made to the work, or the manner in which it was done, until December 31, 1904, when the appellant notified respondent that the work was not satisfactory to the superintendent, because the slope was not constructed on a straight line, and respondent was directed to repair the slope.

There seems to be no contention that the work done after the first seventy-five feet was not satisfactory, but the appellant contends that the superintendent was not satisfied with the first seventy-five feet of work, and that the appellant did not agree to accept that part of the work, and therefore the respondent should not recover. Respondent, on the other hand, showed in substance that the president and superintendent of appellant company did agree to accept the first seventy-five feet of work, and that respondent, after he had quit work, went back and finished the same upon lines furnished by the superintendent, with the express understanding that, if he did so, the work done would be satisfactory. It will thus be seen that there was a direct issue of fact upon this question whether the work was satisfactory to the superintendent. We think the trial court correctly found with the respondent upon the evidence.

Appellant contends that the complaint is not sufficient because it does not directly allege that the work was performed "to the satisfaction of the mine superintendent." Several authorities are cited to the point that, where suit is brought upon a contract requiring work to be done to the satisfaction of another, it is necessary to allege that fact. We think the allegation that the defendant accepted the work is sufficient to bring the complaint within the rule. But, assuming

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that the complaint was deficient in this respect and that the court should have sustained the demurrer upon this ground, still under our liberal practice this is not sufficient for a reversal of the case; because, had the demurrer been sustained, the respondent should have been allowed to amend. Evidence was introduced tending to show that the work was done to the satisfaction of the superintendent and, as above stated, this was the principal issue tried in the case. Upon this appeal it is our duty to treat the complaint as amended, if necessary, to correspond with the facts proved. We conclude, therefore, that, if the trial court erred in overruling the demurrer, such error is not reversible. The other assignments of error are disposed of by the ones decided above.

The judgment appears to be right, and is therefore affirmed. No costs will be allowed to respondent on this appeal.

ROOT, DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 6296. Decided November 5, 1906.]

ANN COATES, *Respondent*, v. JOSEPH TEABO, *Appellant*,
SAMUEL R. McCaw, *Defendant*.¹

APPEAL—REVIEW—FINDINGS. The findings of a trial judge who heard all the witnesses, will not be disturbed on appeal where the evidence is conflicting, and there is unquestionable testimony to support the findings.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered February 1, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title to land. Affirmed.

Henry R. Harriman, and S. D. King, for appellant.

Charles Bedford and E. D. Wilcox, for respondent.

¹Reported in 87 Pac. 355.

HADLEY, J.—This action was brought to quiet title to certain land, and Samuel R. McCaw and Joseph Teabo were made defendants. Both defendants answered, setting up claims adverse to plaintiff, but pending the action the plaintiff and the defendant McCaw adjusted their differences, and a supplemental answer was filed showing such settlement. The issue which was tried was that made by the complaint and defendant Teabo's answer.

Both parties admit that the land in question was conveyed by the United States by patent to Marcellus Spott, an Indian. In January, 1903, said Spott died intestate, and he was at the time of his death the owner of the land in question. The plaintiff alleges that Spott left surviving him a brother, known as James Coates, and that said Coates was the sole surviving heir at law of said Spott. In June, 1903, James Coates died, intestate and without issue, leaving as his sole heir at law his widow, Ann Coates, the plaintiff in this cause.

The defendant Teabo denies that Coates was an heir of Spott, and avers that one Harriet was a full sister of Spott; that she was lawfully married to Joseph Teabo, Senior, and that five children, including the defendant Joseph Teabo, were the issue of said marriage; that all of said children except the defendant Joseph Teabo died without issue before the commencement of this action; that said Harriet died intestate in the year 1883, leaving the defendant Joseph Teabo as her sole heir. These allegations are denied by the plaintiff, and upon the issues thus formed, the case was tried.

It will be seen that the plaintiff traces her claim of title to the land by descent from Spott to his brother, Coates, and from the latter to her as his surviving wife. The defendant Teabo traces his claim by descent from Spott to himself as the sole surviving heir of Harriet, who is alleged to have been a sister of Spott. The court gave judgment against defendant Teabo, and he has appealed.

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The sole questions presented by the appeal are based upon the court's findings as to the facts. It is conceded that, if Coates was a brother of Spott, he became an heir at law of Spott. While appellant denied such heirship, yet we think the evidence overwhelmingly establishes that Spott and Coates are brothers. Coates therefore inherited at least a part of the land, and the respondent, as his surviving wife, seems to have been his sole heir at law. We at least find no contention that she was not such sole heir. She therefore inherited the interest of Coates, whatever that may have been. Under the record, Coates inherited all the land from Spott, unless the said Harriet was a sister of Spott and Coates, in which event the appellant, as the son of Harriet, inherited from Spott the interest that would have gone to appellant's mother if she had survived Spott.

The chief contention is whether the evidence establishes that Harriet was a sister of Spott and Coates. The court found that it does not. We have carefully read all the evidence, the record thereof being somewhat voluminous upon this subject. Many witnesses, both Indians and white persons, testified, and a number of Indians testified through an interpreter. It would not be profitable to undertake an analysis here of the extensive testimony. It must be said that there is conflict; but the trial court observed and heard all the witnesses, and determined that appellant had not shown by a preponderance of the testimony that Harriet was a sister of Spott and Coates. The burden was upon appellant to show such fact. The opportunity of the trial court to hear and observe the witnesses is valuable in every case for the purpose of determining the weight that shall be given to the testimony, an opportunity not afforded to this court. We think that the trial court's opportunity in that regard was particularly valuable in this case. There is unquestionably evidence to sustain the findings, and we do not think we should say, from the record before us, reinforced by the

fact that the trial court saw and heard all the witnesses, that the findings are against the weight of the evidence.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 6418. Decided November 5, 1906.]

JAMES J. ANDERSON *et al.*, *Plaintiffs and Appellants*, v.
C. A. SNOWDEN *et al.*, *Defendants and Respondents*.¹

TENANCY IN COMMON—CONTRACT TO PURCHASE LAND—EXPIRATION OF TIME LIMIT—FORFEITURE—NOTICE TO COTENANT. Where two parties enter into an agreement to purchase certain land, each to furnish one-half of the purchase price, their rights must be determined under the rules relating to joint owners or tenants in common; and one party cannot, upon failure of the other to furnish his part of the purchase price within the required time, demand payment and declare a forfeiture and claim full title upon paying the whole sum due on the unpaid purchase price.

SAME—QUIETING TITLE—TENDER OF AMOUNT DUE—ACTION AGAINST COTENANT. In such a case the party in default is not entitled to a decree quieting title and declaring him to be the owner of a one-half interest, without first tendering his share of the purchase price, for which sum the other party has a lien upon the land.

Cross-appeals from a judgment of the superior court for Pierce county, Chapman, J., entered April 18, 1906, after a trial on the merits before the court without a jury, dismissing an action to quiet title without granting relief to either party. Reversed.

Hudson & Holt and *H. P. Burdick*, for appellants, contended, *inter alia*, that though there has been a partial performance by one party, if he fails in a substantial way to carry out the balance of the contract, the other party may rescind, if he can place him in *statu quo*. *Luey v. Bundy*, 9 N. H.

¹Reported in 87 Pac. 356.

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Citations of Counsel.

298, 32 Am. Dec. 359; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677. As a general proposition Anderson had the right to rescind the contract when Snowden failed and refused to perform. *Drake v. Goree*, 22 Ala. 409; *De Peyster v. Pulzer*, 3 Barb. 284; *Tinsley v. Foster* (Tex. Civ. App.), 25 S. W. 298; *Commercial Bank v. Weldon*, 148 Cal. 601, 84 Pac. 171; *McMullen v. Hoffman*, 75 Fed. 547. Where the respective rights of joint tenants are contingent upon certain payments, and one fails and neglects to make payment of his part, his cotenant may, after notice, make payment of the whole and take title to the exclusion of the delinquent. *Mandeville v. Solomon*, 39 Cal. 125; *Stoll v. Griffith*, 41 Wash. 37, 82 Pac. 1025; *Niday v. Cochran* (Tex. Civ. App.), 93 S. W. 1027; *Stubblefield v. Hanson* (Tex. Civ. App.), 94 S. W. 406; *Wright v. Sperry*, 21 Wis.* 331. Where a purchaser of goods has knowledge of his own inability to pay for them, his intention not to pay must be presumed. *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501. Even a conditional sale contract vests such title in the community as to require the wife's signature to an assignment of the interest. *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822. The deeds were absolute conveyances, and not mortgages. 20 Am. & Eng. Ency. Law (2d ed.), 940; *McNamara v. Culver*, 22 Kan. 661; *Plummer v. Ilse*, 41 Wash. 5, 82 Pac. 1009.

Fogg & Fogg, for respondents, contended, among other things, that a joint tenant or joint owner of land cannot take up or pay off an encumbrance for which both are liable on the joint property, and thereby exclude his co-owner from any further interest in the land. *Burnett v. Ewing*, 39 Wash. 45, 80 Pac. 855; *Freeman, Co-Tenancy and Partition*, § 154; *Cedar Canyon etc. Min. Co. v. Yarwood*, 27 Wash. 271, 67 Pac. 749; *Stoll v. Griffith*, 41 Wash. 37, 82 Pac. 1025. The conveyances to Cushman, Wright and Johnson being made as security only were in legal effect mortgages only, and created only liens on the property, and would have re-

quired a foreclosure in the regular way in order to terminate the interests of Snowden and Anderson in the land. *Mears v. Strobach*, 12 Wash. 61, 40 Pac. 621; *Snyder v. Parker*, 19 Wash. 276, 53 Pac. 59, 67 Am. St. 726. Plaintiff's remedy was to pay off the common encumbrance on the common property, and then enforce his resulting equitable lien on Snowden's interest in the lands for the amount due from him. 3 Pomeroy, Equity Jurisp. (3d ed.), § 1220; *Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103; *Moon v. Jennings*, 119 Ind. 130, 20 N. E. 748, 21 N. E. 471, 12 Am. St. 383; *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *McLaughlin v. Estate of Curts*, 27 Wis. 644. The conduct of plaintiff's wife must be held to be a ratification of the arrangement between her husband and Snowden. *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634. The court having acquired jurisdiction of the parties and of the subject-matter of the action, should have entered a decree that would have been a complete adjudication and settlement of all disputes between the parties relative to the subject-matter of the suit. 1 Pomeroy, Equity Jurisp. (3d ed.), § 242; *Jordan v. Coulter*, 30 Wash. 116, 70 Pac. 257; *Lawrence v. Halverson*, 41 Wash. 534, 83 Pac. 889; *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629; *Calkins v. Steinbach*, *supra*.

RUDKIN, J.—This is an action to quiet title. The material facts occurring prior to the 5th day of December, 1904, are recited and embodied in a written memorandum of that date, prepared by the plaintiff James J. Anderson, and signed by him and the defendant C. A. Snowden. The memorandum is as follows:

"This memorandum witnesseth, that, heretofore, in the month of September, 1904, the undersigned entered into three contracts of purchase of thirty-two acres of land, being all of the N. E. quarter of S. E. quarter, Section Two, Township 20, North, Range 3 East of W. M., excepting a strip of eight acres off the east side of said forty acre tract belonging to James Alexander, from James Brewer, David

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Brewer and Louisa Jackson, the whole purchase price of said thirty-two acres to be \$4,800.

"That towards the purchase price of said lands the undersigned C. A. Snowden furnished the sum of Two Hundred Dollars in cash, and has further paid the sum of Seven Dollars as interest upon one of the notes hereinafter mentioned.

"That the undersigned James J. Anderson has paid towards the purchase price of said lands the sum of One Hundred Dollars in cash and has further paid on account of said lands the following sums: For abstract of title, \$12.50; for surveying, \$6.00; for recording contracts and deeds, \$6.50; for interest on notes hereinafter mentioned, \$19.00.

"That the undersigned have borrowed from the Pacific National Bank \$650, evidenced by two notes, one being for \$350.00 and one being for \$300.00, the proceeds of which notes were paid on account of said lands.

"That in order to complete the purchase of said lands the undersigned obtained from E. E. Cushman the sum of \$1,450 and as security for same, had a portion of said lands deeded to said E. E. Cushman, taking back from said Cushman a contract for the reconveyance of said portion of said lands upon payment to him of \$1,812.50; and also obtained from George P. Wright and Mrs. Mary Johnson the sum of \$2,400, and had a portion of said lands deeded to said Mrs. Johnson and said George P. Wright as security for same, taking back from said Mrs. Johnson and Geo. P. Wright a contract for reconveyance of said lands on payment to them of \$3,000.

"That the undersigned, C. A. Snowden and James J. Anderson, have each an equal share in the contracts for reconveyance of said lands by said Cushman, Wright and Johnson, subject to the contribution and payment by each of one-half of all moneys heretofore paid or to be paid on account of the purchase of said lands, the intention being that they shall each bear an equal share of the sums above mentioned as having been paid out, and an equal share of amounts to be paid in satisfaction of said notes when same are to be paid, the various sums so paid out to be adjusted between them that each shall bear an equal part of the same in the aggregate.

"That the said contracts of reconveyance have been made in the name of James J. Anderson for convenience, this

memorandum being made to evidence the fact that said C. A. Snowden has an equal share in same on the conditions above stated.

"Dated, December 5th, 1904

Jas. J. Anderson.

"Made in duplicate.

C. A. Snowden."

Some time thereafter, and prior to the 1st day of September, 1905, Anderson paid to the Pacific National Bank the two promissory notes referred to in the memorandum, and on the latter date served on the defendant Snowden the following written notice:

"Tacoma, Washington, September 1st, 1905.

"Mr. C. A. Snowden, Dear Sir: Referring to a certain written memorandum or agreement signed by you and myself, of date December 5th, 1904, with regard to a certain option or contract with George P. Wright and Mrs. Mary Johnson, and also with regard to a similar contract with E. E. Cushman, I write this to notify you that the time limit under the contract with George P. Wright and Mrs. Mary Johnson expires today, September 1st, 1905; and to further notify you that the amount necessary to be paid by you in order to protect any right or interest that you may have under or in said contract, is the sum of Sixteen Hundred and Ninety Dollars (\$1,690.00), which said sum you are hereby notified to contribute towards the payment to said George P. Wright and Mrs. Mary Johnson, according to said contract with them, on this day; and in case of your failure to contribute said sum on this day for said purpose, any and all right or interest that you may have in or to said contract will be at once forfeited.

"Further referring to contract with E. E. Cushman mentioned in said agreement between you and myself, I notify you that the time limit for the performance of said contract with Mr. Cushman has been extended to and including October 1st, 1905; and further, that the amount necessary to be paid by you on or before that date in order to protect any right or interest that you may have in or to said contract with Mr. Cushman, is the sum of Ten Hundred and Thirty-six and 25-100 Dollars (\$1036.25); and in case of your failure to contribute said sum towards the payment to said Cushman on or before October 1st, 1905, according to the terms of

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said contract, all right or interest that you may have in or to same will at once be forfeited.

"You are further notified that in case of your failure to meet your portion of the amount necessary to complete the payments under the said option contracts or either of them as above set forth, and in case I shall elect to and do, at my own cost and expense, make said payments or either of them, I shall then refuse to recognize any claim that you or any one claiming through you, may make under and by virtue of said agreement between you and myself as to the land so purchased by me. This notice is given in order to give you every opportunity to protect any rights that you may have in the matters referred to should you see fit to do so.

"Yours very truly, Jas. J. Anderson."

Snowden failed to comply with the requirements of the notice, and thereupon Anderson paid the several amounts due Cushman and Wright and Johnson, and took from them conveyances of the property referred to in the memorandum. Since the service of this notice and the payments to Cushman, Wright and Johnson, Anderson has refused to recognize Snowden as having any interest in the property, and on November 15, 1905, brought the present action to quiet title.

On the foregoing facts, the plaintiffs contend that the defendants have forfeited any and all interest they may have had in the property, by failure to pay their portion of the purchase price. The defendants, on the other hand, have filed a cross-complaint, and ask that they be declared the owners of an undivided one-half interest in the property, subject to the payment of their portion of the purchase price. The court below found the facts substantially as above set forth, and dismissed the action, without granting any relief to either party. From this judgment, both parties have appealed, and will hereafter be referred to as designated in the court below.

The plaintiffs contend, if we understand them correctly, that the relationship existing between themselves and the de-

defendants was that of vendors and purchasers, and that by failure to pay the purchase price on demand, the defendants forfeited all rights under their contract. If their premise is correct, the conclusion might follow; but we think this is a mistaken idea as to the relationship created and existing between the parties. There is no more reason for holding that the defendants acquired their rights by purchase from the plaintiffs, than for holding that the plaintiffs acquired their rights by purchase from the defendants. Under the testimony, the findings of the court, and more especially the written memorandum prepared by one of the plaintiffs, the parties to this action were joint purchasers, or tenants in common, and their rights and obligations must be determined by the law governing that relation rather than the law applicable to the relation of vendor and purchaser. Their common property was held under deeds to secure a common indebtedness. Each tenant in common was a surety for the other. The only remedy of either was to pay the common indebtedness, and be subrogated to the rights of the creditors against the common property. The remedy of the plaintiffs was by contribution and not by forfeiture. One tenant in common cannot forfeit the rights of his cotenant in their common property by notice or demand. The claim of the defendants does not appeal very strongly to a court of equity, and it may well be that they are endeavoring to speculate on the capital of others, but this was one of the incidents of the bargain the plaintiffs entered into, against which a court can grant no relief. As said by the court in *Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103,

“The conduct of the defendant, Steinbach, as evidenced by his answer, does not commend itself to a court of equity, but it has not worked a forfeiture of any of his interest in the lands in question. He is bound to the plaintiff for such proportion of the redemption money, with interest, as his interest in the lands bears to the whole thereof; and as security for payment of such sum, plaintiff holds an equitable lien

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upon all of the interest of Steinbach in the property. To enforce the relative rights and obligations of the respective parties, it is necessary that this amount be judicially ascertained, a day fixed within which it be paid, and a decree to the effect that, in default of such payment, defendant be forever foreclosed of all right or interest in the lands."

The plaintiffs were, therefore, not entitled to the relief demanded in their complaint; nor were the defendants entitled to the relief demanded in their cross-complaint. They could not appeal to a court of equity to declare them the owners of an undivided one-half interest in the property without first paying or tendering their portion of the purchase price. But while neither party was entitled to the relief demanded, nevertheless, the court had jurisdiction of the parties and the subject-matter of the action, and should have granted to the parties such relief as they were entitled to under the facts.

The judgment is therefore reversed, and the cause remanded to the court below, with directions to ascertain the amount the defendants should pay to make up their one-half of the purchase price, and any other sums the plaintiffs may have paid on account of the common property, with interest from date of payment, and to enter a decree declaring the defendants the owners of an undivided one-half interest in the premises in controversy upon the payment of the sums thus ascertained within ten days from the date of the decree, and if they fail to make payments within that time, to enter a decree quieting the plaintiffs' title as prayed in their complaint. Neither party will recover costs on this appeal.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

Root and Crow, JJ., took no part.

[No. 8454. Decided November 8, 1906.]

CHEHALIS COUNTY, *Respondent*, v. EUGENE FRANCE,
Appellant, JOHN VOSPER *et al.*, *Defendants*.¹

TAXATION—FORECLOSURE OF COUNTY CERTIFICATES—COMMENCEMENT OF ACTION—STATUTES—CONSTRUCTION. No complaint is required for the foreclosure of a county general tax certificate, and under Pierce's Code, § 8694, the proceeding is instituted by filing the certificate with the clerk (RUDKIN, J., dissenting).

SAME—PROCESS—SERVICE BY PUBLICATION—TIME FOR SERVICE. Under Pierce's Code, § 8691, service by publication in a county tax foreclosure need not be commenced within ninety days from the commencement of the action, as in other civil actions.

SAME—SUMMONS FOR PUBLICATION—SUFFICIENCY. A summons for publication in a county tax foreclosure is not insufficient for informality in describing the plaintiff in the caption when properly described in the body of the summons.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 7, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a county to foreclose tax liens. Affirmed.

J. B. Bridges, for appellant.

E. E. Boner, for respondent.

HADLEY, J.—This is a proceeding by the county of Chehalis to foreclose general tax liens against property for which certificates of delinquency were not issued to individuals. The record shows the following facts: Certificates of delinquency were issued to the county by the county treasurer for the unpaid taxes of 1895 and prior years, in accordance with Pierce's Code, § 8694 (3 Bal. Code, § 1751b). The certificates were issued in book form, were filed by the treasurer with the clerk of the superior court of said county as required

¹Reported in 87 Pac. 353.

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by said section, and within the time required by Pierce's Code, § 8705 (§ Bal. Code, § 1769), to wit, in December, 1901. Thereupon the treasurer, with the assistance of the then prosecuting attorney of said county, published a notice for the foreclosure of the certificates, and thereafter in due course judgment was entered purporting to foreclose all of the said tax liens. It was afterwards discovered that the published notice was defective and void, and that the judgment for that reason was also void. No deed was ever made in pursuance of the attempted foreclosure.

In October, 1905, the county, as plaintiff in the foreclosure proceeding, filed in the cause a petition or motion, setting forth the facts in reference to the published notice, and the procedure leading up to the judgment, and asked for an order setting aside the judgment and directing the republication of the notice for the foreclosure of said tax liens. Such an order was made and filed in the cause. Thereafter notice was published, and the defendant Eugene France, who is the owner of certain property sought to be foreclosed, appeared and contested the right of the county to foreclose in the above manner. His special appearance raising the question of jurisdiction having been overruled, he answered, setting up the above-stated facts. The cause was then tried and judgment was entered foreclosing all the certificates of delinquency, including those issued against the lands of defendant France, who has appealed.

Appellant admits that the certificates were issued and filed with the clerk of the superior court as required by law, but urges that compliance has not been made with § 8705, Pierce's Code, in that the proceeding to foreclose was not commenced before January 1, 1902. The certificates were filed with the clerk before that time, and if that constituted a commencement of the foreclosure proceeding, it was commenced within the statutory time. It will be observed that the section cited provides that upon certificates for the particular taxes included in this action, viz., those for 1895 and prior years,

held by the county, foreclosure proceedings must have been commenced prior to January 1, 1902. The foreclosure proceeding is a special statutory one and no formal complaint is required to be filed. Section 8694, Pierce's Code, merely provides that the county treasurer shall first file the certificates with the clerk, and that the subsequent procedure shall be as in the case of an individual certificate holder. In the latter case, Pierce's Code, § 8691 (3 Bal. Code, § 1751), provides merely for the giving of notice that the holder will apply to the superior court for judgment. We think the proceeding to foreclose the county certificates is initiated by the filing of the certificates with the clerk, and that it is thereby commenced. This suit was therefore commenced before January 1, 1902, as required by law.

It is further contended that, if the action was commenced by the filing of the certificates, the court has nevertheless lost jurisdiction by reason of failure to publish the notice within ninety days from the date of such filing. Our attention is called to Pierce's Code, § 8692 (Bal. Code, § 1751), which provides that the summons in this special proceeding shall be served in the same manner as summons in a civil action is served in the superior court. It is also pointed out that Pierce's Code, § 326 (Bal. Code, § 4869), provides that a civil action may be commenced by the filing of a complaint with the clerk of the court, but that unless service has been had prior to the filing of the complaint, one or more defendants must be served personally, or publication service commenced within ninety days from the filing of the complaint. In this case there was no personal service, and publication was not made within ninety days after the certificates were filed. If this proceeding is governed entirely by the general statute, appellant's contention must prevail. The only service provided for county foreclosures is by publication, and § 8692, *supra*, refers only to the manner of making such service; that is to say, the time the publication shall run, the place where the summons shall be published, and other details

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pertaining to the method of making publication service. As to the time when the actual service may be made, we find that § 8691, *supra*, provides that the individual certificate holder may give the notice "any time after the expiration of three years from the original day of delinquency." There is manifestly no limitation as to the time when the individual certificate holder may give his notice after the right to give it accrues. The same must be true as to counties, for after the certificates have been filed, "the same proceedings shall be had as when held by an individual." We therefore conclude that, under the special statute, the county was not required to commence publication within ninety days, as is required in ordinary civil actions.

The further point is made that the summons last published was insufficient. It is entitled, "In the Superior Court of the State of Washington for the County of Chehalis. State of Washington, County of Chehalis, plaintiff, v. John Vosper etc., defendants." Appellant asks the question whether the state of Washington or the county of Chehalis is plaintiff under the above caption. While it is true the caption is somewhat informal, yet the body of the summons clearly describes the county of Chehalis as the plaintiff, and it is manifest that no one could have been misled by the informality in the caption.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting).—I dissent. Pierce's Code, § 8705, provides "That on all certificates of delinquency issued for the taxes of 1895 and prior years, proceedings for foreclosure under the provisions of this act may commence on and after December 1, 1900, and not sooner; and on certificates of delinquency for 1895, and prior years, held by the county—[and such are the certificates involved in this case]—proceedings must be commenced on or before the first day of Janu-

ary, 1902, by the several county treasurers under the provisions of this act." Pierce's Code, § 8694, provides that:

"After the expiration of five years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on said property to the county, and shall file said certificates when completed with the clerk of the court, and the treasurer shall thereupon, with such legal assistance as the county commissioners shall provide in counties having a population of thirty thousand or more, and with the assistance of the county prosecuting attorney in counties having a population of less than thirty thousand, proceed to foreclose in the name of the county, the tax liens embraced in such certificates, and the same proceedings shall be had as when held by an individual: *Provided*, That summons may be served or notice given exclusively by publication in one general notice, describing the property as the same is described on the tax rolls. Said certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the liens against said property may be brought in one action and all persons interested in any of the property involved in said proceedings may be made co-defendants in said action, and if unknown may be therein named as unknown owners, and the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein."

It seems to me the requirements of the last section, that the county treasurer shall proceed to foreclose the certificates of delinquency filed with the clerk with the legal assistance therein provided for, that the proceedings may be brought in one action against all parties in interest, that certain persons shall be named as defendants, etc., are utterly inconsistent with the holding that the foreclosure proceedings are commenced by simply filing the certificates of delinquency with the county clerk. I am therefore of opinion that the proceedings before this court were not commenced within the time limited by law, and that the judgment should be reversed.

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Citations of Counsel.

[No. 6317. Decided November 9, 1906.]

STARK BROTHERS, *Appellants*, v. ALLEN ROYCE, *Respondent*.¹

EXECUTION—SALE—CONFIRMATION—INVALID JUDGMENT. Where a judgment purporting to foreclose a mortgage lien is void, in so far as it authorizes a sale of premises, the court may refuse to confirm the sale, upon the objection of the defendant who defaulted, and in such proceeding may determine whether the judgment must be set aside.

JUDGMENTS—VACATION—NOTICE. Vacation of a judgment cannot be objected to for want of notice, where the record shows service of notice of motion and an appearance by the party to contest the motion.

SAME—MODIFICATION FOR IRREGULARITY. A judgment irregularly obtained is properly modified upon motion.

SAME—INVALIDITY. A void judgment may be set aside upon motion.

SAME—VACATION OF DEFAULT—IRREGULARITY. A default judgment beyond the purport and scope of the pleadings is irregularly obtained, rather than erroneous, and may be set aside on motion.

CONTRACTS—CONSTRUCTION—AGREEMENT FOR PAYMENT OF MONEY OR MORTGAGE. A contract to purchase fruit trees reciting that the purchaser is the owner of certain lands and that he "binds himself, his heirs, assigns and grantees" of said lands, cannot be treated as a mortgage of the premises, but is a simple contract for the payment of money.

Appeal from orders of the superior court for Chelan county, Steiner, J., entered March 24, 1906, and April 3, 1906, sustaining objections to the confirmation of a sale of land and vacating a judgment therein, on motions of the defendant. Affirmed.

A. W. Barry (*Wm. C. Brown* and *Ira Thomas*, of counsel), for appellants, contended, among other things, that the judgment, being regular upon its face, and no objections being made to matters concerning the regularity of the execution

¹Reported in 87 Pac. 340.

sale, plaintiffs were entitled to an order confirming the sale. *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054; *Leinenweber v. Brown*, 24 Ore. 548, 34 Pac. 475, 38 Pac. 4; *Fitch v. Minshall*, 15 Neb. 328, 18 N. W. 80; *Bear v. Bookmiller*, 3 Ohio Cir. Ct. 484; *Cowdin v. Cowdin*, 31 Kan. 528, 3 Pac. 369; *Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451; *Challis v. Wise*, 2 Kan. 193; *Bachle v. Webb*, 11 Neb. 423, 9 N. W. 473; *Hoover v. Hale*, 56 Neb. 67, 76 N. W. 457; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059. The motion to vacate the judgment would not avail, for the statute requires it to be by petition, etc., and this remedy is exclusive. Bal. Code, § 5156; *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740; *Walton v. Hartman*, 38 Wash. 34, 80 Pac. 196. The court had no authority to vacate or modify the decree for error in law. *Tacoma Lumber & Mfg. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115, 755; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *Bank of United States v. Moss*, 6 How. 31, 12 L. Ed. 590; *Schell v. Dodge*, 107 U. S. 629, 2 Sup. Ct. 830, 27 L. Ed. 601; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; *In re Washington etc. R. Co.*, 140 U. S. 91, 11 Sup. Ct. 673, 35 L. Ed. 339; *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; *Bank v. Labitut*, 1 Woods (U. S.) 11; *Crabtree v. Neff*, 1 Bond (U. S.) 555; *Eagle Mfg. Co. v. Draper*, 14 Blatch. (U. S.) 334; *Fischer v. Hayes*, 6 Fed. 63; *United States v. Malone*, 9 Fed. 897; *Allen v. Wilson*, 21 Fed. 881; *Morgan's Louisiana etc. R. Co. v. Texas etc. R. Co.*, 32 Fed. 525; *Klever v. Seawall*, 65 Fed. 373; *Ex Parte Cresswell*, 60 Ala. 378; *Loney v. Bailey*, 43 Md. 10; *Mason v. Pearson*, 118 Mass. 61; *State ex rel. Ozark County v. Tate*, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. 664; *Fredericks v. Davis*, 6 Mont. 460, 13 Pac. 125; *Edwards v. Janesville*, 14 Wis. 27; *Aetna Life Ins. Co. v. McCormick*, 20 Wis. *265; *Lincoln Bank v. Perry*, 66 Fed. 887; *Woffenden v. Woffenden*, 1 Arizona 328, 25 Pac. 666; *Roberts v. Haggart*, 4 Dak. 210; *Dick Co. v. Nickelman*, 77 Fed. 853; *Sexton v. Rock Island*

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Lumber etc. Co., 49 Kan. 153, 30 Pac. 164; *Center Township v. Marion County*, 110 Ind. 579, 10 N. E. 291; *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. 23; *Dufur v. Home Inv. Co.*, 122 Wis. 470, 100 N. W. 831. The instrument is in law an equitable mortgage or lien upon the land described therein. *Curtis v. Janzen*, 7 Wash. 58, 34 Pac. 131; *Society of Shakers v. Watson*, 68 Fed. 730; *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431. No particular form of words are required to constitute an equitable mortgage or lien upon land. *Whitney v. Richardson*, 13 N. Y. Supp. 861; *Payne v. Wilson*, 74 N. Y. 348; *Bell v. Pelt*, 51 Ark. 433, 11 S. W. 684, 14 Am. St. 57, 4 L. R. A. 247; *Racouillat v. Sansevain*, 32 Cal. 376; *Margarum v. Christie Orange Co.*, 37 Fla. 165, 19 South. 637; *Brown v. Brown*, 103 Ind. 23, 2 N. E. 233; *Higgins v. Manson*, 126 Cal. 467, 58 Pac. 907, 77 Am. St. 192; *Dulaney v. Willis*, 95 Va. 606, 29 S. E. 324, 64 Am. St. 815; *Peers v. McLaughlin*, 88 Cal. 294, 26 Pac. 119, 22 Am. St. 306; *McQuie v. Peay*, 58 Mo. 56; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 13 South. 948, 46 Am. St. 56; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. 889; *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614; *Vaniman v. Gardner*, 99 Ill. App. 345; *Wayt v. Carwithen*, 21 W. Va. 516; *Moore v. Lackey*, 53 Miss. 85; *Richardson v. Barrick*, 16 Iowa 407; *Robinson v. Farrelley*, 16 Ala. 472; *Dunman v. Coleman*, *Mathis & Fulton*, 59 Tex. 199; *Flagg v. Mann*, 2 Sum. (U. S.) 486; *Fisk v. Stewart*, 24 Minn. 97; *Newlin Fernley & Co. v. McAfee*, 64 Ala. 357; *Anthony v. Anthony*, 23 Ark. 479. The order refusing confirmation of sale of the real estate is appealable. *State ex rel. Hibbard & Co. v. Superior Court*, 21 Wash. 631, 59 Pac. 505. The order denying appellants' motion to strike the objections of respondent to the confirmation of sale is appealable. *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054.

The order vacating and modifying the judgment in this case was a final order and judgment, and terminated the rights of appellants, and is appealable. *Hibbard, Spencer, Bartlett & Co. v. Delanty*, 20 Wash. 539, 56 Pac. 34; *Sengfelder v. Powell-Sanders Co.*, 40 Wash. 686, 82 Pac. 931.

Reeves & Reeves, for respondent. The order vacating and modifying the judgment was not appealable. *Sengfelder v. Powell-Sanders Co.*, 40 Wash. 686, 82 Pac. 931. The averments of the complaint were insufficient to bring before the court the particular question of establishing a lien against the land, and the judgment was therefore void. 1 Black, Judgments, § 242; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; *Gillie v. Emmons*, 58 Kan. 118, 48 Pac. 569, 62 Am. St. 609; *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36, 5 Am. St. 262. Implied liens are not favored by the law, and though they may sometimes be inferred, the intention to create them ought to plainly and satisfactorily appear. *Owens v. Claytor*, 56 Md. 129. Where a lien is not raised by operation of law explicit words are generally necessary to create it. *Williams v. Price*, 5 Munford (Va.) 507. An instrument containing no express words of grant does not create a lien, and one claiming it to be an equitable mortgage must show the intention of the parties to this effect by evidence aliunde the writing. *Jones v. Kennedy*, 138 Ala. 502, 35 South. 465. The calling of the instrument an "indenture" does not evidence an intention of the parties to create a lien. *Walker v. Keile*, 8 Mo. 301. The proceedings by motion were regular. *Griffith v. Maxwell*, 25 Wash. 658, 66 Pac. 106. The passing on the question as to whether the so-called indenture was an equitable mortgage, not being presented by the pleadings or supported by evidence, was an irregularity, and one for which a vacation of the judgment is authorized. *State ex rel. Hennessy v. Huston*, 32 Wash. 154, 72 Pac. 1015; *Corn Exchange Bank v. Blye*, 119 N. Y. 414, 23 N. E. 805. Judgments may and should be set aside by the court rendering

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them, at the same or subsequent terms, for irregularity. *Black*, Judgments, § 326; *Mason v. Kansas City etc. R. Co.*, 58 Kan. 817, 51 Pac. 284. On default the plaintiff can take such judgment, and such judgment only, as the facts properly alleged, show him to be entitled to. 6 Ency. Plead. & Prac., 106, 117, 118; *Johnson v. Dowling*, 1 Tex. Civ. Cas. § 1091. Where a record shows that a judgment in the trial court is entered for a larger sum than the plaintiff is entitled to under his petition, it may be modified or vacated by the court at or after the term at which it was rendered. Bal. Code, § 5153; *Clevenger v. Hansen*, 44 Kan. 182, 24 Pac. 61; *Tobie v. Commissioners of Brown County*, 20 Kan. 14; *Small v. Douthitt*, 1 Kan. *335; *Walla Walla Print. & Pub. Co. v. Budd*, 2 Wash. Ter. 336, 5 Pac. 602; *Carpenter v. Barry*, 26 Wash. 255, 66 Pac. 393; *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134.

FULLERTON, J.—On September 8, 1894, the respondent, Royce, entered into a contract with the appellants by the terms of which he agreed to purchase from the appellants a certain number of fruit trees, at an agreed price, payable in ten equal annual installments. The contract was in writing, and recited that the respondent was the owner of one hundred and sixty acres of land in what is now Chelan county, which was clear and free from incumbrances and to which he had perfect title. The contract further recited that the respondent, for the payment of the purchase price of the trees in accordance with the terms therein stated, “binds himself, his heirs, assigns and grantees of and to the aforesaid lands.” The writing was acknowledged by the respondent before a notary public, in form then required for the acknowledgment of deeds to real property.

At the time of the execution of the contract, the land attempted to be described was unsurveyed government land on which the respondent was a mere settler, having all the rights acquired by one settling upon unsurveyed lands, but no legal

title to the same whatsoever. Afterwards, however, and before the action was instituted, he acquired a government patent to a quarter section of land in the section described in the contract, although not of the same technical description as the one therein described.

This action was brought in July, 1905. The appellants treated the contract as a mortgage upon the land described in the respondent's patent, and in their complaint alleged that the land had been erroneously described in the contract by mutual mistake, and asked to have the description corrected so as to make it conform to the description contained in the patent. A foreclosure of the lien, and a sale of the property according to its amended description, was prayed. The respondent defaulted in the suit, and judgment was taken against him as prayed for in the complaint. The land was sold under the judgment, and return thereof duly made by the officer making the sale, and docketed for confirmation.

The respondent then appeared for the first time. He filed objections to the confirmation of the sale, basing his motion on the contention that the judgment under which the sale was had was void. At the same time he moved to vacate and set aside all that part of the judgment which adjudged the contract to be a lien upon his real property, and directing its foreclosure and sale, basing his motion on the grounds, (1) that the judgment had been irregularly obtained; and (2) that it was void on its face because beyond the scope of the allegations of the complaint. These motions to vacate and the objections to the confirmation were heard by the court at the same time. At the conclusion of the hearing, the court sustained the objections to the confirmation of the sale, and granted the motion to vacate the judgment in part, letting it stand as a personal judgment against the respondent, but vacating and holding it for naught in so far as it adjudged the contract set out in the complaint to be a lien upon the land therein described,

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and directing its sale. From these orders, and from a prior order refusing to strike the objections to the confirmation on appellants' motion, this appeal is taken.

The order refusing to strike the objections filed by the respondent to the confirmation of the sale is discussed by the appellants in connection with the order sustaining the objections, and we shall consider it in the same manner. To this order it is objected that it is based on grounds not authorized by statute. It is argued that, inasmuch as the judgment under which the sale was had was entered by a court having jurisdiction of the subject-matter of the action, and of the person of the defendant, and was regular upon its face, the only inquiry permitted was as to the regularity of the proceedings had in making the sale; and, as the objections of the respondent did not question the regularity of these proceedings, the court was in error when it refused to confirm the sale. The case of *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054, is relied upon to sustain the contention. That case does lay down the rule that the regularity and sufficiency of a judgment, fair upon its face, cannot be inquired into at a hearing had on objections made to the confirmation of a sale, even where the sale is made under an execution issued on such judgment. To attack a judgment in this manner was said to be a collateral attack, and it was only where the judgment was void on its face that such an attack could be successfully made. The court, however, did make use of certain language in further discussing the statute that would seem to justify the appellants' contention; and the same may be said of the case of *Harding v. Atlantic Trust Co.*, 26 Wash. 536, 67 Pac. 222, subsequently decided.

But in the later case of *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16, these cases were modified in the latter respect, and a much wider inquiry was held permissible; the court holding that the question whether real estate sold under

execution was at the time of the sale exempt as a homestead might be inquired into and determined on a motion for confirmation of the sale. This last case justifies the order in question here. If the order vacating and setting aside, as improvidently entered, that part of the judgment authorizing and directing the sale is valid, then unquestionably an order of confirmation of the sale cannot in any manner aid the appellants. The sale, as against them must fail for want of a judgment to support it; and, since they are the purchasers at the execution sale, they can acquire no title by its mere confirmation, whatever might be the rights of a third person purchasing at a judicial sale had under a judgment fair on its face. Hence, a confirmation in so far as it would affect the appellants can be of no validity, while it might compel the respondent to resort to an independent action to remove the apparent cloud on his title. It is the policy of the law to avoid circuity of actions, and inasmuch as the subject-matter of the controversy between the parties, as well as the parties themselves, was before the court in this proceeding, we conclude that the court could properly take cognizance of the fact that the judgment on which the sale was founded must be set aside, and refuse for that reason to confirm the sale.

It is next contended that the court was without jurisdiction to modify the judgment. In support of this contention it is said that the motion to vacate was heard without notice to the appellants; that the proceeding should have been by petition, and not by motion; and that the court was without authority to modify the judgment for any of the reasons stated in the motion. As to the first objection, the record does show that the motion was served upon the appellants on March 9th, 1906, was noticed for hearing on the 13th of the same month, and that it was heard on the 24th of the month. But it shows further that the appellants appeared at the hearing by their attorneys and resisted the motion, and does not show that any objection

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was made to such hearing on the ground of insufficient, or want of, notice. Under these circumstances, this court cannot say there was lack of notice. On the contrary, it appears to us that the proceedings were regular and orderly.

The second contention is settled by the statute itself. The trial court modified the judgment on the ground of irregularity in obtaining it, and by § 5155 of the code [Bal. (P. C. § 1035)], it is expressly provided that where the grounds for vacating or modifying a judgment are for irregularities in obtaining the judgment the proceedings shall be by motion. *Griffith v. Maxwell*, 25 Wash. 658, 66 Pac. 106. But had the order been based on the second ground of the motion, namely, that the judgment was void, the result would not be different, as a void judgment is properly set aside upon motion. *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858; *Dane v. Daniel*, 28 Wash 155, 68 Pac. 446.

As to the contention that the court was without authority to modify the judgment for any of the reasons stated in the motion, it would seem, unquestionably, that if the judgment was void in so far as it directed a foreclosure of the asserted lien, the court had jurisdiction to modify it by striking out the void part, and its order in that respect could not be a nullity for want of power to make it. But it is contended that, conceding the judgment to be founded on an erroneous construction of the contract set out in the complaint, it was nevertheless merely voidable and not void, and must be vacated, if vacated at all, on the first ground stated in the motion of respondent, namely, that it was irregularly obtained. And on this question it is argued that the facts do not show an irregularity in obtaining the judgment which the law permits to be corrected by motion, but an error of law committed by the court that can be corrected only by a direct appeal from the judgment.

It has seemed to a majority of this court that the judgment in question was only voidable and not void, and hence

we agree with the appellant that authority for its modification must be found in the first branch of the motion, rather than the second; that is, that it was irregularly obtained. Taking this view of the matter, we still think the judgment is one coming within the definition of an irregular, rather than that of an erroneous, judgment. If the respondent's view of the contract be correct, a question we will notice later, the judgment was one entered by default beyond the purport and scope of the pleading; that is to say, it was one the appellants were not entitled to under any of the allegations of their complaint. It is a general rule that a default admits only those allegations of a complaint that are well pleaded. 6 Ency. Plead. & Prac. 117. So, it is also a general rule that a defendant has a right to rely on the presumption that a court will not, on his default, enter a judgment against him not warranted by the pleadings. *Bosch v. Kassing*, 64 Iowa 312, 20 N. W. 454. Any default judgment, therefore, which goes beyond the scope of the pleadings, inasmuch as it is a judgment against which the defendant has had no opportunity to defend, is a judgment obtained contrary to the course and practice of the courts, and hence, is a judgment irregularly obtained, within the meaning of the statute, rather than one entered through error of law committed by the court. Cases in point are *Vass v. Peoples' Building & Loan Ass'n*, 91 N. C. 55, and *Larson v. Williams*, 100 Iowa 110, 63 N. W. 464, 69 N. W. 441, 62 Am. St. 544. In the first case, a judgment was entered against certain defendants who had been summoned to appear by leave of court as additional parties defendant, but against whom no pleadings had been filed. After the judgment had been entered the defendants moved against it on the ground that it had been irregularly obtained. This motion was granted by the trial court and affirmed on appeal; the appellate court saying:

"An irregular judgment is one given contrary to the method of procedure and the practice under it, allowed by

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law. As, if judgment should be given against an infant, no guardian having been appointed or appearing to represent him and take care of his interests in that behalf; or, where the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right thereto; or, where a judgment was prematurely entered by default; or, where it was the duty of the plaintiff to give notice of the taxing of costs, and failed to give such notice, and took judgment. In such and like cases, the judgment is irregular, and upon proper application of the party injured the court would set it aside for such irregularity. *Keaton v. Banks*, 10 Ired. 381; *Dick v. McLaurin*, 68 N. C. 185; *Cowles v. Hayes*, 69 N. C. 410; Freeman on Judgments, § 97. Then, is the judgment in question irregular in a material respect? We think it is; and that it is so because it was without any proper pleading on the part of the plaintiffs that put the appellees to any defence they might be able and see fit to make."

The second case was an equitable action, brought to set aside a default judgment entered against the wife of the principal defendant. A personal judgment had been taken against her, although it appeared from the allegations of the complaint that she was not personally liable, as she was not a party to the contract out of which the liability arose. The notice served upon her, however, recited that a personal judgment would be taken against him if she did not appear and defend the action. The statute there provided that a judgment may be vacated, among other causes, for "irregularity in obtaining the judgment," and the question was whether the facts brought the case within that provision of the statute. On this question, the court said:

"We think the facts alleged and established make these grounds applicable in this case. Here was a petition which contained no allegations authorizing a personal judgment against Celia Larson. Counsel taking the decree of the court knew such to be the fact. As a lawyer he knew that Celia Larson, might confidently rely upon the fact that nothing was sought, as against her, save the extinguishment of

her dower right in the premises. Having no defense to make to that claim she was not called upon to appear and to answer to the petition. It matters not that the notice said that a personal judgment would be asked against her, as she had a right to rely upon the fact that the petition contained no averment warranting such relief. It is claimed that, as the court by the notice had jurisdiction of the person of Celia Larson, and by law had jurisdiction in a proper case to render a personal judgment as to the subject-matter, therefore jurisdiction was in all respects complete, and, having failed to appear, she is concluded from now being heard. Such claim is not well founded. It is said in *Bosch v. Kassing*, 64 Iowa 314 [20 N. W. Rep. 454]: 'It is true a defendant may be concluded by a default where the facts stated in the petition do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer; but where the petition omits the necessary averment to show liability against the defendant, the court may, and should, even upon default, refuse to enter judgment.' Clearly, then, procuring the court to enter such a judgment, under the circumstances, was an 'irregularity in obtaining a judgment,' under the statute we are considering."

On the question of the nature of the contract set out in the complaint, we are clearly of the opinion that it is not a mortgage or lien of any kind upon the lands described. It does not, by any express words, purport to charge the land with the payment of the indebtedness it creates, and such an intent cannot be inferred from the phrase, above quoted, purporting to bind the "heirs, assigns and grantees" of the lands. But, without further reviewing the question, we think it a simple contract for the payment of money, and did not authorize the judgment of foreclosure originally entered by the court.

We conclude, therefore, that the order appealed from should be affirmed, and it is so ordered.

MOUNT, C. J., RUDKIN, HADLEY, and DUNBAR, JJ., concur.

Crow and Root, JJ., took no part.

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[No. 6468. Decided November 9, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. EDGAR PARSONS
et al., *Appellants*.¹

ROBBERY—FORCE AND PUTTING IN FEAR—IMPERSONATING OFFICERS. There is sufficient element of force and putting in fear to constitute the crime of robbery, where the prosecuting witness, while drunk, was forcibly conducted to a saloon under the pretext that he was under arrest and must be searched, and that the defendants were officers, who were about to lock him up, and who thereupon forcibly took his money when no one else was present, under commands to keep silent.

SAME—INSTRUCTIONS AS TO DEGREE OF FORCE. Upon a prosecution for robbery it is proper to instruct that the degree of force is immaterial if it was sufficient to compel the prosecuting witness to part with his money.

CRIMINAL LAW—TRIAL—INSTRUCTIONS AS TO LESSER DEGREES—REQUESTS. Error cannot be predicated upon the failure of the court to instruct the jury as to lesser offenses included in the charge, in the absence of specific requests therefor.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 27, 1906, upon a trial and conviction of the crime of robbery. Affirmed.

W. H. Abel and *E. A. Philbrick*, for appellants.

E. E. Boner, for respondent.

FULLERTON, J.—The appellants were convicted on an information charging them with robbery, and appeal from the judgment and sentence pronounced upon them. The acts constituting the offense charged took place at Hoquiam on the morning of February 14, 1906, between the hours of twelve and two o'clock. The evidence on the part of the state tended to show that the prosecuting witness, sometime between those hours, entered a restaurant at that place and ordered a meal. He had been drinking the night be-

¹Reported in 87 Pac. 349.

fore, and had not as yet fully recovered from its effects. While his meal was being prepared, he leaned over the counter at which he was sitting and went to sleep. When the meal was ready he was awakened by the waiter, and began eating, but seemingly did not become fully awake and gradually dosed off to sleep again. The appellants came into the room in the meantime, ordered a meal, and while eating it, jested with the waiter and restaurant cook over the prosecuting witness' condition. After they had finished, one of them turned to the cook to settle for their meal, when the other took the witness by the shoulder and aroused him telling him that he must pay for his meal and get out of doors as that place was not a lodging house. The witness then paid for his meal, when the appellant, still holding him by the shoulder, led him out of the door of the restaurant and there told him that he and his companion were policemen, and were going to take him to jail for being drunk.

The other appellant, who had remained talking with the cook until this time, then joined them and the two took the witness down an alleyway into a saloon, where they told him to sit down. No one was in the saloon at the time except the bartender. After seating the witness in a chair, the appellants approached the bartender and held with him a whispered conversation, whereupon he took some keys from a hook and went out into a room a short distance away. While the bartender was out of sight, the appellants again took hold of the witness raised him up and told him he must now go to jail, and that it was necessary to search him before going. They thereupon went through his pockets, taking from him such money as he had, some \$28, and then led him back through the alleyway to the main street where they let him go, telling him to go to a certain saloon, and not let himself be seen on the street until morning. The witness went to his boarding house, where he announced that he had been robbed by the night policemen of the town. His complaint caused an inquiry to be made, which resulted

in the arrest of the appellants within a few hours afterwards. The witness testified that he made no resistance or outcry for the reason that he believed the appellants to be policemen, and would "lick him" if he resisted or made an outcry; that they told him while searching him that he must keep still. The prosecuting witness was a Finlander by birth, who had been in the United States less than four years, and spoke the English language brokenly.

The statute, 3 Bal. Code, § 7103 (P. C. § 1610), defines robbery to be the forcible and felonious taking from the person of another, or from his immediate presence, any article of value by violence or putting in fear, and it is contended by the appellants that the evidence here fails to show such use of force and violence, or such putting in fear, in taking the property as is necessary to constitute robbery under the statute.

The courts generally hold that it is not robbery to merely snatch from the hand or person of another, or to surreptitiously take from another's pocket, money or some other thing of value, as such taking lacks the element of force, or putting in fear, one or the other of which being essential to constitute the crime of robbery. It is also generally held that, where the property is obtained by some artifice or trick, intended to and which does allay resistance and not arouse fear, such as inducing one to part voluntarily with his money or property under the belief that the taker has a lawful right to it, does not constitute robbery. But, on the other hand, it is generally held that whenever the elements of force or putting in fear enters into the taking, and is the cause that induces the owner of the property to part with it, the taking is robbery, no matter how slight the act of force or the cause creating the fear may be, nor by what other circumstance the taking may be accompanied. It is enough that the force, or the putting in fear employed, is sufficient to overcome resistance on the part of the person

from whom the property is taken and is the moving cause inducing him to part unwillingly with his property.

It seems to us that there was in the case before us both the element of force and putting in fear. There was a forcible seizure of the prosecuting witness, his forcible taking to a place where he had no desire to go, a command to keep silent, and a forcible taking against his will of his money from his person. True these acts were accompanied by the false representations to the effect that the appellants were officers of the law having authority to compel him to accompany them, and to take from him his property, but these representations did not induce the prosecuting witness to part with his money—they were still compelled to take it from him. Nor was the mere false impersonation sufficient to enable them to thus obtain the property of the prosecuting witness; they were compelled to exercise their assumed authority by such threats of violence as to put him in fear. It may be that a man of more intelligence and resolution than the witness exhibited would have seen through the very flimsy pretexts the appellants were making, and would have successfully resisted such an attempt as was here successful. But this is beside the question. The law must protect the weak and irresolute as well as those of stronger wills, and it is enough that the person assaulted was intimidated and yielded up his property because of the force used and threatened, be the same ever so slight.

The courts usually hold it robbery to obtain the property of another by means of the ruse used by the appellants in this instance. In *McCormick v. State*, 26 Tex. App. 678, the proof showed that the defendant met the prosecutor at night, and summoned him to throw up his hands, stating at the same time that he was an officer of the law and would arrest the prosecutor for being drunk and noisy. On the prosecutor's yielding to him he took from him a roll of bills. This was held to constitute robbery. In *Williams v. State*, 51 Neb. 711, 71 N. W. 729, defendants, three in num-

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ber, conspired to unlawfully extort money from the prosecuting witness, pursuant to which one of them, falsely pretending to be an officer, took the prosecutor into custody for an alleged misdemeanor, and demanded money, at the same time taking hold of the prosecutor's collar. The prosecutor thereupon handed him twenty dollars, because, as he testified, he was so scared he did not know what he was doing. This money was immediately handed by the person receiving it to his associates. It was held that all three of the persons were guilty of robbery by putting in fear. In *Bussey v. State*, 71 Ga. 100, 51 Am. St. 256, the facts were that the defendant, who pretended to be marshal of the town, having on a star designating the office, seized the prosecutor, to whom another was showing a trick at cards, and upon the exclamation of that other, "there's the marshal," pushed him against the wall and threatened to put him in jail unless he paid money. The prosecutor, to keep from going to jail, and because he "did not want to be bothered," paid him eight dollars. This was held robbery. See, also, *Sweat v. State*, 90 Ga. 315, 17 S. E. 273; *Thompson v. State*, 61 Neb. 210, 85 N. W. 62, 87 Am. St. 453; *Seymour v. State*, 15 Ind. 288.

The appellant has cited cases which maintain that it is not robbery to obtain the property of another by artifice or trick, or by falsely impersonating a police officer, where no element of force or putting in fear enters into the taking, and it may be that one or two of the cases so cited cannot be distinguished in their facts from the facts of the cases above cited or the facts in the case at bar. But we think the better rule is with the cases we have cited.

There was no error in the charge of the court to the effect that the degree of force used was immaterial, as long as it was sufficient to compel the prosecuting witness to part with his property; nor was it error for the court to refuse to give, as part of his charge, the requested instructions submitted by the appellants. These, in so far as they were proper, were substantially included in the charge given.

Finally, it is urged that the court erred in failing to charge the jury on its own motion as to the lesser offenses included in the offense charged in the information. It is conceded that no request was made to the court to give such an instruction as part of his charge, and that no exception was taken because such an instruction was not made a part of the charge. There are well considered cases which sustain the appellants' contention, but we think the weight of authority is the other way. See, also, 11 Ency. Plead. & Prac., 217; 12 Cyc. 639, 640.

Mr. Thompson states the rule in the following language:

"It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that, mere *non-direction*, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by merely excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete. The rule rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is therefore, their duty to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate supplementary instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no

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connection whatever with the merits." Thompson, Trials, § 2341.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

[No. 6303. Decided November 9, 1906.]

WALTER M. FRENCH, *Respondent*, v. AJAX OIL & DEVELOPMENT COMPANY, *Appellant*.¹

PROCESS—SUMMONS—PROOF OF SERVICE—AFFIDAVIT—SUFFICIENCY. Proof of service of summons by affidavit must show that the person making the service was twenty-one years of age at the time the service was made, and proof that he was of age when the affidavit was made is insufficient.

APPEARANCE—SPECIAL TO OBJECT TO SERVICE—OBJECTIONS WAIVED. Want of service of process, objected to by special appearance, is cured by a subsequent appearance to move to vacate a default judgment and for leave to answer on the merits.

JUDGMENTS—DEFAULT—VACATION—DIRECT ATTACK—EFFECT OF RECITALS AS TO DUE SERVICE. The recitals of due service contained in a default judgment is not conclusive upon a direct attack by appeal from the judgment, on overruling an objection to the jurisdiction and motion to vacate the default.

RECEIVERS—APPOINTMENT—WANT OF JURISDICTION. The appointment of a receiver based upon a judgment entered without jurisdiction is also without jurisdiction.

Appeal from an order of the superior court for King county, Griffin, J., entered March 31, 1906, in favor of the plaintiff, upon overruling the defendant's motions to vacate a judgment of default and to grant leave to file an answer. Reversed.

¹Reported in 87 Pac. 359.

W. F. Hays and Fred Page-Tustin, for appellant.

Allen & French, for respondent.

DUNBAR, J.—This action was brought by the respondent, to recover a certain sum of money and for the appointment of a receiver. A default was taken against the appellant, and thereafter, at the instance of respondent, upon affidavit, a receiver was appointed without any notice to appellant. Thereupon appellant, specially appearing, filed its motion to quash the summons and to set aside the default, upon the ground that the court had no jurisdiction of the person of the appellant, which motion was by the court overruled. Thereafter appellant specially appeared, asking the court to open and vacate the judgment of default and grant leave to appellant to file its submitted answer and defense to the merits, which motion was by the court overruled. From the action of the court in overruling these motions, this appeal is taken.

The proof of service in this case is as follows:

"Clay Allen, being first duly sworn, upon his oath, deposes and says, that he is a citizen of the United States and of the state of Washington; that he is more than twenty-one years of age, is not the plaintiff in the above entitled action nor a party in interest therein, and that he is competent to be a witness in the above entitled case; that on Saturday, December 2, 1905, he served a true copy of the summons and complaint in the above entitled action on the defendant therein," etc.,

which return was signed and sworn to. The statute provides, Bal. Code, § 4874 (P. C. § 331), that in all cases except when service is made by publication, the summons shall be served by the sheriff of the county wherein service is made, or by his deputy, or by any person over twenty-one years of age who is competent to be a witness in the action, other than the plaintiff. It is the contention of the appellant that due service was not made in this case, for the reason that it does not appear from the affidavit of Allen that he

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was twenty-one years old at the time the service was made, the affidavit going only to the extent that he was twenty-one years old at the time he made his affidavit, viz., on the 27th day of December, 1905, the service having been made on December 2, 1905. Technical as this may appear, this objection is sustained by authority, and literally there is no proof or showing that the summons was served by a person who was competent under the law to serve it.

It is contended, however, by the respondent that, conceding the summons to have been insufficient, such want of service was cured by the appearance of the appellant in the case in moving to vacate judgment, and asking to file an answer upon the merits. The record shows that the appearance, so far as moving to set aside the default judgment was concerned, was a special appearance without any question; and while the appellant is bound by his general appearance in any order of the court made subsequent to such general appearance, it does not bind him as to orders or judgments of the court made without jurisdiction before his appearance.

It is also contended that the recital of the court would be deemed conclusive upon this court, that due and proper service of the summons and complaint was made, and many cases from this court are cited to sustain that doctrine. An examination of the cases, however, will show that there is a distinction between collateral attacks on judgments, and judgments that are contested by appeal. The original case upon which most of the cases in this court are based was *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20, where the rule was laid down emphatically that, as against collateral attack upon the ground that a summons was insufficient to give the court jurisdiction, it would be presumed, in aid of a decree which recites that service of the complaint and notice had been duly made according to the law, that another and sufficient summons was issued, where there was ample time for the service of another summons

after the completion of the publication of the first. That was a collateral attack upon a judgment many years after it had been rendered, while this is an appeal from a judgment promptly prosecuted as soon as it was known that the default judgment had been entered.

The case of *Rogers v. Miller*, *supra*, and the cases upon which it is based and which have followed it, went upon the theory, which was a plausible one, that the recital by the court that due and sufficient notice had been given was conclusive of the question of jurisdiction, in the absence of an affirmative showing to the contrary by the record itself, and that it might well occur that, although the summons which was attacked was insufficient, if sufficient time had elapsed for the service of another and correct summons, the service of such summons would be presumed, and that it would be wrong to allow judgment of long standing to be destroyed by opportunities which might be presented to defendants to abstract from the records the proper proof of service and leave only as evidence the insufficient proof. But in this case, in addition to the fact that the court does not certify a due and legal service, but certifies only that the defendant was served personally with a true copy of the summons and complaint, and the further fact that the service of the summons fails to show a want of due service, we think it must be held that the default judgment was entered without jurisdiction.

The appointment of the receiver, having been based upon the default judgment, was also without jurisdiction, and must therefore be vacated. The appellant, however, having generally appeared in the action, must be held to be in court for the purposes of any subsequent action on the part of the court. *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431, 82 Pac. 744.

The appellant will, therefore, be allowed to file its answer, and the cause will be remanded with instructions to vacate

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the default judgment, and to proceed with the case upon its merits. On the merits of the case we express no opinion.

MOUNT, C. J., RUDKIN, ROOT, and CROW, JJ., concur.

FULLERTON and HADLEY, JJ., took no part.

[No. 6398. Decided November 9, 1906.]

SAMUEL STARK, *an Infant, by W. J. Stark, His Guardian
Ad Litem, Respondent*, v. PORT BLAKELY MILL
COMPANY, *Appellant*.¹

REMOVAL OF CAUSES—ACTION FOR DAMAGES—JURISDICTION—AMOUNT CLAIMED. In an action for damages the amount claimed in the complaint is the value in dispute, for the purposes of removal to the United States court; and it is not an abuse of discretion to allow an amendment to bring the allegations within the amount claimed in the complaint.

MASTER AND SERVANT—NEGLIGENCE—SCOPE OF EMPLOYMENT—COUPLING CARS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to make it a question for the jury whether a minor was to couple cars as a part of his duty, where it appears that his duties were to pull slack for the loaders and clean off the track, and had been told to "do anything that he saw to be done;" that he saw the cars needed coupling and previously coupled a car in the presence of the head loader.

SAME—DANGER OF COUPLING CARS—ASSUMPTION OF RISK. A boy seventeen years of age who was given no instructions as to the coupling of cars cannot be said to have assumed the risk of injury from having his hand caught, merely from the fact that he testified that he knew he would be injured if he held on to the link until the drawheads came together.

Appeal from a judgment of the superior court for Mason county, Linn, J., entered March 16, 1906, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by an employee in coupling cars. Affirmed.

S. P. Richardson and Hastings & Stedman, for appellant.
Troy & Falknor and L. R. Byrne, for respondent.

¹Reported in 87 Pac. 339.

DUNBAR, J.—This action was commenced in the superior court of Mason county, by a minor seventeen years old, against the defendant, a citizen and resident of the state of California. The verdict of the jury was in favor of the plaintiff, the respondent here.

In the original complaint the respondent avers certain injuries amounting to \$2,040.50, but prays for only \$1,982. Within the time in which the appellant was entitled to plead, it filed its petition and bond for a removal to the United States circuit court. Thereupon the respondent moved to amend his complaint, bringing the allegations of the complaint within the demand, which motion to amend was allowed by the court, and this is the first error assigned by the appellant. The contention is that, the respondent having shown by his original complaint that his damages claimed amounted to more than \$2,000, it was error of the superior court not to grant a removal to the Federal court. 1 Ency. Plead. & Prac., 712, is cited to the effect that, where the real amount in controversy is made to appear, it is the all-controlling criterion of jurisdiction; and many cases are cited to sustain the same doctrine. But an investigation of all of the authorities convinces us that a different rule applies in cases where the action is for damages.

“In all actions sounding in damages the plaintiff is limited by his demand therefor in his declaration or complaint, and can recover no more than the amount specified.” 5 Ency. Plead. & Prac., 712.

“The rule then is settled that the demand of the plaintiff in his declarations, decides the sum in dispute.” *Desbrow v. Griggs*, 16 How. Pr. 346.

“The value of the matter in dispute, for the purposes of removal, is to be determined by reference to the amount claimed in the declaration, petition or bill of complaint.” Dillon, Removal of Causes, § 93.

See, also, *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; *De Camp v. Miller*, 44 N. J. L. 617. In any event, the application to amend was submitted to the discre-

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tion of the trial court, and from the whole record in the case we are satisfied that the discretion was not abused.

At the time the respondent went to work for the mill company, he was instructed as to what his duties should consist of; that is to say, he was to pull the slack for the loaders, to clean bark and dirt off the track, and to stamp the logs. He worked in the performance of such duties until the day before his injury, which occurred when he was attempting to couple one logging truck to another, one of the logging trucks being stationary and the other being pushed up grade by one man at the time of the injury. The contention of the appellant is that the respondent had never been ordered to make couplings, and that, therefore, the appellant was not responsible for any injury that happened to him in the performance of the work which was unauthorized.

The testimony shows that, on the evening before the accident, Mr. Gill, the agent of the company, told respondent to "get in and do anything that he saw to be done," and that immediately he proceeded to do anything that he saw it was necessary to do in and about the work in which he was engaged; that when he saw the cars needed to be coupled, he coupled them; that he coupled one car that evening in the presence of Mr. Kempler, the head loader, and that the next morning when coupling another car, Mr. Kempler shoving the movable car, the accident occurred. There is some conflict in the testimony as to the latitude of the instruction given by Mr. Gill, but that was a question for the determination of the jury.

This whole case resolves itself into this proposition: Was the respondent instructed to couple the cars, or did he have a right to construe his instructions to include the coupling of cars? We think there was sufficient testimony on that subject to permit the jury to determine that the respondent was justified in concluding that he was authorized and instructed to couple cars, as well as to do anything else that was to be done around there. The car coupling was not ex-

cepted from the general direction. It is conceded that the boy was not instructed how to couple cars, or informed of the danger of coupling cars. It is contended by the appellant that the boy appreciated the danger, from the fact that he stated he knew that if he did hold on to the link until the drawheads came together his hand was bound to be crushed. Of course he did understand that, but equally of course he did not intend to hold on to the link until the drawheads came together and crushed his hand. His testimony was that, in noticing the danger to his legs, he turned around to protect them, and that, inadvertently of course, he left his hands in the dangerous place too long. Every man of common intelligence knows that if his hand comes in contact with a running saw, or his head with a descending pile-driver, or any part of his body with any dangerous piece of machinery in motion, he will be injured. If the simple fact that he knew that if there was a contact between his person and the dangerous machinery, injury would result to him, would preclude him from recovering, no man could ever recover, no matter what the negligence of the employer was in not furnishing him a safe place, or not informing him of the perils incident to his particular employment.

Many objections are made to the instructions in this case, but they involve questions that have been determined over and over by this court, and it would be unprofitable to again enter into a discussion of them. The instructions it seems to us were all fair and stated the law, and were as favorable to the appellant as instructions could possibly be and keep within the law.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and RUDKIN, JJ.,
concur.

ROOT, J., dissents.

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[No. 6298. Decided November 9, 1906.]

JOHN R. FOSTER *et al.*, Respondents, v. H. C. TAYLOR *et al.*,
Appellants.¹

BROKERS—COMMISSIONS FOR SALE OF REAL ESTATE—ACTION TO RECOVER—EVIDENCE—SUFFICIENCY. A judgment for a broker's commission in the sum of \$500 is supported where the uncontradicted evidence was to the effect that, after authorizing a sale at \$3,000, upon a commission of five per cent, the owners left it to an agent, authorizing any deal he might make, and the agent authorized a sale for \$3,500 with a commission of \$500, which the brokers made, the owners afterwards refusing to complete the deal.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 5, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for a broker's commission for the sale of real estate. Affirmed.

Ira Bronson and D. B. Trefethen, for appellants.

Hastings & Stedman, for respondents.

DUNBAR, J.—The complaint alleges, in substance, that the respondents, who are real estate brokers in the city of Seattle, were employed by H. C. Taylor, one of the appellants, to sell the property described in the complaint, first for \$2,000, then \$2,500, then for \$3,000; and agreed to pay the usual five per cent commission; that shortly before the appellant Taylor left the city, he told Mr. Knipe, one of the respondents, that if he had an opportunity to sell the property, he could go to one McConnaughey, who he claimed had some interest in the property, and deal with him just the same as directly with Taylor; that having a chance to sell the property, Knipe sought McConnaughey, and McConnaughey told him he could sell it, and all over \$3,000 that he (Knipe) obtained he could have as his commission; that he obtained a

¹Reported in 87 Pac. 358.

purchaser, one Sol Asher, for the sum of \$3,500, receiving \$100 from Asher to bind the bargain; that the appellants were notified of the sale, and refused to comply with their contract, and this action was brought to recover the \$500 claimed to be due respondents. The answer was in effect a general denial. The case was tried by the court, who found the issues in favor of the plaintiffs, respondents here.

As was said by the court in an opinion accompanying the record, we do not see how this case could be otherwise decided than in favor of the respondents. The testimony showed, that the allegations of the complaint were true; that the appellants had placed this property in the hands of the respondents for sale, agreeing to give them five per cent commission; that, when appellants went away, they referred respondents to McConnaughey, saying that if they had an opportunity to sell the land, they could deal with him the same as they could with the appellants; that the respondents made a contract with McConnaughey that, if they sold the land, any amount which they received over \$3,000 should constitute their commission. This was the positive testimony of the respondents, and it was also testified to by McConnaughey, the appellants' agent, who testified that the transaction was a straight one, that he was informed at the time the sale was made that the respondents were getting \$3,500 for the land, and that he told them that it did not make any difference to the vendors how much respondents got; that the vendors wanted \$3,000 clear to them. The contract also provided that a good title should be given to the purchaser.

The appellants were informed of the sale, and sent a deed for the land, but some taxes were discovered to be due on the land, and the deed in form not suiting the attorney for the purchaser—being a deed of special warranty—other deeds were prepared and executed by the appellants, but before the deeds were satisfactorily executed the transaction was declared off, and the appellants refused to convey. This testimony is uncontradicted, the appellants not testifying in

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the case either orally or by deposition, and no one testifying in their behalf. It is true that the counsel for the appellants testified in the case, but his testimony did not reach any of the material issues, he claiming his legal right to refuse to divulge private correspondence and communications between himself and his client. The record is very brief, but seems to us to be absolutely conclusive of the respondents' right to recover.

Judgment is therefore affirmed.

FULLERTON, HADLEY, ROOT, and CROW, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6242. Decided November 9, 1906.]

MARY J. SMITH, *Appellant*, v. MUTUAL RESERVE LIFE
INSURANCE COMPANY, *Respondent*.¹

INSURANCE—FORFEITURE—NONPAYMENT OF PREMIUMS—NOTICE—CHANGE OF ADDRESS. Where in accordance with the provisions of the policy, the by-laws of the company, and the laws of the state, notice of premiums due were mailed to the insured at his duly authorized postoffice address, in Butte, Montana, failure to receive the notice by reason of removal to Florida does not keep the policy alive, nor does correspondence respecting a mortuary call stating that the insured left home hurriedly and asking that receipt therefor be mailed to a given address in Florida amount to sufficient notice to the company of a permanent change of address.

SAME—NECESSITY OF NOTICE TO BENEFICIARY. In such a case, it is not necessary to give notice to the beneficiary who was the wife of the insured, especially where she was notified that the next notice would be mailed to the insured at his authorized address.

SAME—DATE OF ACCRUAL OF PREMIUMS—ACQUIESCENCE IN PROVISIONS OF POLICY. Upon a failure to pay a premium when due according to the terms of the policy, it cannot be claimed that the policy did not go into effect until some months after its date and that premiums were not due at the time specified, where for eight years payments had been demanded and made in accordance with the terms of the policy.

¹Reported in 87 Pac. 347.

Appeal from an order of the superior court for King county, Albertson, J., entered February 10, 1906, granting a new trial upon motion of the defendant, in an action upon a policy of life insurance. Remanded on the merits, with direction to dismiss the action.

Frank C. Park, for appellant.

Parsons & Parsons, for respondent.

DUNBAR, J.—This is an appeal from an order of the superior court granting a new trial. At the close of the testimony, the court directed the jury to find a verdict in favor of plaintiff for the full amount sued for. Defendant moved for a new trial upon the statutory grounds. The motion was granted by a general order. The particular ground of the order is immaterial on this appeal. All the evidence is before this court, and the lower court on this same evidence took the cause from the jury and ordered judgment for plaintiff, and on this same evidence granted a new trial. The discussion in the briefs and oral argument of respective counsel is upon the merits of the case. We have examined the case upon the merits, and will so decide the question at issue.

The action was upon a policy of life insurance, and was brought by the appellant, the beneficiary in such insurance policy, who was the wife of the insured at the time the insurance was issued. The policy was issued on the 23d day of May, 1895. The insured died on July 7, 1904. The policy provided that notice should be sent, the by-laws of the company provided that notice should be sent, the laws of the state of New York provided that notice should be sent, when payments were due. There was a provision in the policy that the notice, addressed to a member or other person designated by said member, at the last postoffice address appearing upon the books of the association, should be deemed a sufficient notice; also provided that in the event of the nonreceipt of

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a notice, it should nevertheless be a condition precedent to the continuance of the policy that a sum equal at least to the last preceding mortuary premium and dues should be paid to the association within thirty days from the first week of the month when due; also provided that notice that a mortuary premium and dues were payable to said association at the dates written on the first page of the policy, in every year, was thereby given and accepted for all purposes, and that any further or other notice was expressly waived. The postoffice address of the insured appearing upon the books of the company was 115 Main Street, Butte, Montana, and all the prior notices had been sent to that address. The last notice was not received by the insured or the beneficiary. On April 1, 1904, the regular semi-annual premium call became due upon the policy, and notice thereof was duly and regularly mailed to the insured at his Butte address, March 31, 1904. This notice was not received by the insured by reason of his having been in Florida at the time, and the payment was never made, the insured having died shortly after that time.

It is not necessary to determine many of the questions discussed in the briefs of respective counsel, notably the applicability and effect of the New York statutes, or whether the applicant was bound by the provisions in the contract in relation to the waiver of the notice, or whether the appellant had a right to rely upon, and the respondent was bound by, the respondent's custom of giving notice when payments were due. For, under the undisputed facts in this case, the respondent honestly and intelligently attempted to comply with its usual custom in that respect, by sending the usual notice to the postoffice address which theretofore, during the life of the policy, had been the address of the insured, the address to which all the prior notices had been sent, and the address which was incorporated in the policy itself. It does not appear that the respondent had ever been notified to change the address, and the contract provides that all notices

addressed to a member at the last postoffice address appearing upon the books of the association shall be deemed a sufficient notice.

The following correspondence is, however, relied upon by the appellant as sufficient notice to the respondent of the insured's change of residence. In November, 1903, the mortuary call of \$3.42 was made upon said policy, notice of which was mailed to insured at Butte, at his proper address. On November 28, the insured remitted \$3.35 to pay said call, with a letter as follows:

"Interlachen, Florida, Nov. 28, 1903.

"New York Mutual Reserve Fund Life Association,

"Gentlemen—Please find enclosed the sum of three dollars and thirty-five cents as extra assessment for my policy. I have forgotten the number of policy, and left home in such a hurry that I forgot to bring the notice with me. Kindly send me receipt at Interlachen, Florida.

"Wm. H. Fenton, D. D. S., Interlachen, Florida."

On December 2, the company acknowledged said remittance by a letter as follows:

"Dr. W. H. Fenton, Interlachen, Florida:

"Dear Sir—I beg to acknowledge receipt of your favor of the 28th ult., enclosing a remittance of \$3.35 on account of the November call, on your policy No. 189449. I write to remind you that the amount of the call, as stated in the notice, was \$3.42, and your remittance was therefore short seven cents. Kindly remit the same amount in postage stamps, to complete the payment.

"Yours very truly, G. W. Page, Superintendent."

In response to that letter the company received a letter from the insured as follows:

"Interlachen, Florida, December 7, 1903.

"Mutual Reserve Life Insurance Company:

"Gentlemen—Please find herein the seven cents that was deficient in the \$3.42, a mistake made by myself in remittance one week since. Respectfully,

"W. H. Fenton, D. D. S., Interlachen, Fla."

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Opinion Per DUNBAR, J.

There was certainly no authorization in this correspondence to change the permanent address of the applicant. On the other hand, it rather conveyed the idea that the applicant had left home temporarily; and while there was considerable correspondence, the whole time from the commencement to the end of the correspondence included only nine days. We think the company would not have been justified in concluding from this correspondence that the permanent residence of the insured had changed, and was justified in addressing him in subsequent communications and notices at Butte, Montana. It would have been an exercise of only common prudence for the insured, if his permanent residence was changed, to have notified the company to that effect, and also to have left instructions at Butte, Montana, for his mail to be forwarded to him.

The appellant, the beneficiary under the terms of the policy, also insists that the company knew of her residence in Oklahoma Territory, by reason of certain correspondence between her and the company which is set forth in the record. In the first place, the company was not under obligations, in the absence of instructions, to notify any one but the insured, or to keep track of the changing residence of the beneficiary. She, being the wife of the insured, would be presumed to have the same residence that he had. In addition to this, in the correspondence referred to between the respondent and the appellant, she was notified that the last dues assessed had been paid to the collector of the company at Butte, Montana. The company also wrote to her as follows:

"The next semi-annual premium is due October 1, 1903, of which due notice will be forwarded to insured at 115 Main Street, Butte, Montana, unless in the meantime we have authority to change his address."

It is not shown that such authority was given, and from the whole record it appears that the failure of the assured to

receive notice was due to his own negligence, and not in any way to the negligence of the insurance company.

Another contention is made by the appellant, that the policy did not go into effect for some months after it was issued; that therefore the payments were not due at the time they were made, and that the last payment was therefore not due until after the death of the assured. No claim of this kind was made in the pleadings, the complaint alleging that the first premium was paid July 10. No application was made to amend the complaint in that regard to correspond with the evidence, and in fact we think that the evidence would not have warranted the court in permitting such amendment, especially in view of the fact that for eight years the payments had been made in accordance with the terms of the policy, and that no suggestion had been made that the payments were not properly demanded.

In consideration of the whole record, we are of the opinion that the appellant is precluded from a recovery in this case, and, inasmuch as a case is not presented where the appellant could recover upon a new trial, it would be a useless thing to send the case back for trial. The cause will, therefore, be remanded with instructions to the lower court to dismiss the action.

MOUNT, C. J., FULLERTON, HADLEY, and RUDKIN, JJ., concur.

Crow and Root, JJ., took no part.

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Citations of Counsel.

[No. 6424. Decided November 9, 1906.]

ANNIE SHANNON *et al.*, *Respondents*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

DAMAGES — EXCESSIVE VERDICT — EJECTION OF PASSENGER FROM TRAIN. A verdict for \$1,000 damages for the ejection of a woman from a train, due to the mistake of a ticket exchanger, is excessive and should be reduced to \$500, where it appears that the same resulted in a delay of but twenty-four hours, accompanied only by such anxiety and annoyance as would ordinarily excite the mind of a woman under such circumstances, and only a temporary illness by reason of such excitement.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered February 27, 1906, upon the verdict of a jury rendered in favor of the plaintiffs for \$1,000, in an action for damages for ejecting a passenger from a railway train. Affirmed on condition of remitting \$500.

B. S. Grosscup and *A. G. Avery*, for appellant, on the point that the verdict was excessive, cited the following as passenger cases: *Atchinson etc. R. Co. v. Hogue*, 50 Kan. 40, 31 Pac. 698; *Sloane v. Southern R. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Gillen v. Minneapolis etc. R. Co.*, 91 Wis. 633, 65 N. W. 373; *Terre Haute etc. R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96; *Chicago etc. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Georgia R. & Banking Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. 490; *Cincinnati etc. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729; *Alabama etc. R. Co. v. Gibbs* (Miss.), 12 South. 545; *Gulf etc. R. Co. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. 501; *Texas etc. R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. 400; *Louisville etc. R. Co. v. Breckenridge*, 99 Ky. 1, 34 S. W. 702; *Chicago etc. R. Co. v. Chrisholm*, 79 Ill. 584; *Turner v. North Beach etc. R. Co.*, 34 Cal. 594;

¹Reported in 87 Pac. 351.

Goins v. Western R. Co., 59 Ga. 426; *Central R. Co. v. Strickland*, 90 Ga. 562, 16 S. E. 352; *Illinois Central v. Cunningham*, 67 Ill. 316; *Du Laurans v. St. Paul etc. R. Co.*, 15 Minn. 49, 2 Am. Rep. 102; *McLean v. Chicago etc. R. Co.*, 50 Minn. 485, 52 N. W. 966; *Norfolk etc. R. Co. v. Neely*, 91 Va. 539, 22 S. E. 367; *Norfolk etc. R. Co. v. Wysor*, 82 Va. 250.

Governor Teats, for respondents.

HADLEY, J.—This is an action to recover damages based upon the following facts: On August 31, 1904, the plaintiff Annie Shannon purchased tickets at the defendant's ticket office in Seattle, for the transportation of herself and minor son from Seattle to Butte, Montana, over the defendant's railway line. They went upon one of the defendant's trains and occupied a tourist sleeper. The ticket exchanger came around and took up the tickets, but negligently gave a receipt with the wrong punch mark thereon as indicating the place of destination. The receipt indicated Spokane instead of Butte as the place of destination. They retired for the night and the next morning a new conductor came aboard. What occurred thereafter is perhaps best told in Mrs. Shannon's own words, which we quote from her testimony as follows:

"I did not look at them any more until the conductor came on in the morning, about twenty-five minutes to nine, I think it was; and he asked for tickets. I didn't have any tickets, so he looked at his envelopes and says: 'Your destination is Spokane?' I says: 'No, sir; it is Butte.' And he went on. And he came back again and he said: 'No, your destination is Spokane.' I said: 'No, I bought my tickets in Seattle for my boy and myself and had signed them for Butte.' So, he didn't seem—well, he said he would see if there was a mistake, and he looked through his tickets again. So he did not come around again, so I went to hunt him up to ask if he had found the mistake, and I guess I must have bothered him considerable, because he says: 'Madam, you leave me alone,' that he would attend to them. So then I

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went after one of the brakemen, and he said: 'Well, just keep after him.' And then he came back after awhile, and he said: 'You occupy berth number eleven?' I says: 'Yes; my boy is there now,' and I said 'I bought my tickets for Butte,' and I started to tell him over again about it; and he says: 'Now, madam, you occupy number eleven and right here shows Spokane, and how can you say you bought a ticket for Butte?' And so I told him I did; I signed the tickets there. So just then my boy asked what the trouble was, and I told him, and he called the conductor a liar. . . . I told him that my tickets were for Butte, and he wanted to know if I occupied number eleven and I said: 'Yes,' so he says: 'Well, now, madam, how can you say you bought tickets to Butte when the checks show Spokane. You occupy number eleven?' And I says: 'Yes.' So then my boy stuck in, and he went to strike him—

"Q. What did the boy say? A. He called him a liar. He says: 'Ma, what is the trouble?' and I says: 'He says we have no tickets for Butte; that they are only for Spokane,' and he says: 'He is a liar,' so he got angry— Q. Who did? A. The conductor did, and he stepped toward him as if he threatened to strike him, and a lady sitting there says to him: 'That boy was sick all night; don't hit him.' And he said: 'I don't care whether he was sick or not,' but he did not strike him; just stepped toward him. He was still in the berth. So he went on and didn't say anything more. I expected the conductor to speak to me again about the tickets, but he did not; and the brakeman told me to talk to him about the tickets, but I did not. So, later, just before I got off the train at Spokane, he come in and seemed quite anxious for me to keep my seat, and he said that the mistake would be discovered when we got to Spokane. So just before he left the train— Q. Where did he leave the train? A. At Spokane. So I kept my seat; and then two more men came on, and asked if Mrs. Shannon was in that car, and I told them that was my name. And he asked me where I was going, and I says: 'Butte,' and he says: 'Have you your ticket?' I says: 'No, sir; my ticket was lost on the train; and he says: 'Oh, madam, I could not listen to any story and talk like that. We hear that kind of talk every day.' I don't know which he did say. 'Well,' I says, 'I tell you that I bought them in Seattle,' and

he says: 'You had better get off the train and go to the ticket agent and get tickets for Butte, and if there is a mistake—if we find there is a mistake, your money will be refunded to you in Butte. So I went to do so, and I found I did not have enough money to buy them, so I went back to the train and started to tell them over again about it, and he took me by the arm, and he says: 'See here, madam, we are holding this train. We have held this train six minutes for you now, and you will have to get off the train and get off quick,' and so I started to get off the train. My baggage was not picked up nor anything; and so I got my things up and got out as quick as I could. They were in a rush, and insisted on me getting off, and told me I would have to get out. The conductor said: 'You had better get off here or we will put you off at the next stop, and it will be pleasanter for you to get off here.'

"Q. Then what did you do? A. Well, I went back to the ladies' waiting room. I felt bad and I stayed there. I cried. I felt ashamed to think I was treated so. And then a gentleman came over and asked me what the trouble was, and I told him they put us off the train. . . . I went to the superintendent'. He directed me to the superintendent's office, and I told him about it; and he said he had not heard anything about it until about twenty minutes before the train came in. I told him about it and he said he would see if anything could be done about it. So I waited around the depot till I think about seven o'clock that evening; and I went up to the office several times, and sometimes they would notice me and sometimes not. And one time I went up there to see if they had discovered the mistake, and they said the line was down. So I went back to the depot and waited for awhile and then went back again, because I could not rest until I found out about the mistake. And so I told him it was getting late, and I was a stranger, and my boy was not well, and I showed him where I got a room and told him if he found the mistake, why, to let me know; and when he did he came in the morning and told me this. All that night I was sick. I did not eat anything the night before. I did not eat any breakfast, dinner nor supper that day."

The above is a substantial statement of what occurred, using Mrs. Shannon's own description. The mistake having

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been discovered, the tickets were found and returned to Mrs. Shannon the next morning, and she and her son then proceeded to Butte on one of the defendant's trains. The suit was brought by Mrs. Shannon and her husband. The answer admits the mistake of the ticket exchanger. The cause was tried before a jury, and a verdict for plaintiffs was returned in the sum of \$1,000. The defendant moved for a new trial, which was denied, and judgment was entered for the amount of the verdict. This appeal is from the judgment.

The motion for new trial specified as one of its grounds that the verdict is excessive, and the chief contention in this court is that the trial court erred in not granting a new trial for that reason. This court is of the opinion that the verdict is excessive. The respondent, Mrs. Shannon, was subjected to annoyance and anxiety by reason of the circumstances, and the testimony shows that she was ill during the night she remained over at Spokane, produced probably by her worry and anxiety over the affair. The illness, however, appears to have been of a temporary character only. Such annoyance and inconvenience are very exasperating to a traveler, and the appellant is clearly liable in some amount, since the whole trouble arose from the carelessness of its ticket exchanger. The resulting delay was, however, for twenty-four hours only, accompanied with the anxiety that would ordinarily excite the mind of any lady subjected to the same circumstances. We think, however, that upon no fair basis for estimating actual money damages can respondent be said to have sustained damages to the extent of \$1,000. We think \$500 would abundantly compensate her, and that judgment should not be awarded for a greater sum.

The cause is therefore remanded to the trial court with instructions to vacate the judgment upon the return of the remittitur herein, and if within twenty days thereafter the respondents shall, in writing, remit \$500 from the amount of

the verdict, the court shall then enter judgment against appellant for \$500. Otherwise it shall grant a new trial.

MOUNT, C. J., FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 6318. Decided November 9, 1906.]

JOSHUA PEIRCE, *Respondent*, v. J. W. WHEELER, *Appellant*,
TACOMA LAND AND IMPROVEMENT COMPANY,
Defendant.¹

TRIAL—FINDINGS OF FACT—SUFFICIENCY AND NECESSITY IN EQUITABLE ACTIONS. Findings of fact and conclusions of law may be stated upon the same page, if segregated, especially in an equitable action.

FRAUDS—STATUTE OF—SALE OF LANDS—MEMORANDUM—ORAL AUTHORITY TO SIGN—BROKERS—STATUTES—CONSTRUCTION. LAWS 1905, p. 110, amending the statute of frauds and requiring a contract for the employment of a broker to be in writing, does not change the rule in this state that the authority of a broker to execute a written contract for the sale of lands need not be in writing.

SAME—MEMORANDUM OF SALE—DEFINITENESS—SPECIFIC PERFORMANCE. A broker's memorandum of sale of real estate which describes the lots, and states all the terms of payment, is sufficiently definite for specific enforcement.

SPECIFIC PERFORMANCE—DECREE—OBJECTIONS. It cannot be objected to a decree for the conveyance of all of defendant's interest in certain lots, that some of the lots had, by the defendant, been previously contracted to be sold to other persons not parties to the suit; as such interests are not affected by the decree.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 7, 1906, after a trial on

¹Reported in 87 Pac. 361.

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the merits before the court without a jury, decreeing the specific performance of a contract to convey real estate. Affirmed.

Byers & Byers, for appellant.

T. L. Stiles, for respondent.

HADLEY, J.—This is an action to enforce specific performance of a contract to sell real estate. The defendant Tacoma Land and Improvement Company was the owner of a certain eighty-acre tract of land, and it contracted in writing to sell the same to one Gregg for the consideration of \$12,000, a part of which was to be paid in cash and the remainder by installment payments covering a period of four years. Thereafter, with the assent of said company, Gregg sold and assigned his interest in the said contract to the defendant Wheeler. Wheeler took possession of the land and caused it to be platted under the name of "Barker's Addition to the City of Tacoma." Thereafter Wheeler sold his interest in many of the lots within said addition, but the plaintiff alleges that, on the 19th day of February, 1906, he still retained the interest which the said contract gave him in three hundred and sixty-eight of the lots. It is also alleged that, on the said date, Wheeler employed one Gregory as his agent to procure a purchaser for said three hundred and sixty-eight lots, and to contract for the sale of the same to any purchaser whom he might find; that on said day Gregory offered to sell said lots to the plaintiff for the sum of \$12,000, of which sum \$4,000 was to be paid in cash upon the passage of the necessary papers, and the balance according to the terms of the said Tacoma Land and Improvement Company contract, as the payments should become due thereunder; that the plaintiff accepted the offer, and that Gregory communicated the fact of the sale and the terms thereof to Wheeler, who assented thereto and directed Gregory to proceed and complete the sale; that plaintiff paid to Gregory

\$500 as a part of said cash payment of \$4,000, and that Gregory executed and delivered to plaintiff a contract in writing for the sale of the lots upon the terms mentioned; that all of said facts were communicated by Gregory to Wheeler, and that the latter assented thereto; that thereafter Wheeler refused to be bound by said contract, and refused either to execute a deed to plaintiff for the lots or to assign said Tacoma Land and Improvement Company contract; that plaintiff has offered to pay in the manner provided by the contract, and now brings into court the sum of \$3,500, the balance of the cash payment, for the use of said Wheeler. Wheeler answered and denied generally the material allegations above stated. The cause was tried by the court without a jury, and resulted in a judgment requiring the defendant Wheeler to perform the contract. He has appealed from the judgment.

Appellant complains that the findings of fact and conclusions of law were not separately stated. It is true they appear upon the same page, but the conclusions of law are clearly segregated by separate statement and paragraph from the findings of facts. No one can be confused or misled by the findings and conclusions as stated, and appellant's rights were in no way prejudiced thereby. Moreover, this is an equitable action, and this court has held that the statute with relation to findings of facts does not apply to such actions. *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003.

The evidence does not disclose any written authority from appellant to Gregory as his agent to sell the real estate in question, for which reason appellant contends that the contract which Gregory made with respondent cannot be enforced. This contention is based upon the statute of 1905 as found in chapter 58, page 110, of the Laws of that year. It will be observed that the statute is an amendment to Bal. Code, § 4576 (P. C. § 5543), relating to contracts and pro-

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viding that certain contracts shall be void unless in writing. The pertinent part of the statute is as follows:

"In the following cases specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say; . . . 5. An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

We think it is manifest that the legislature intended to reach such contracts only as involve the relations of an owner and his agent with respect to the recovery of compensation or commission for services in selling or purchasing real estate. To hold that the statute was intended to require the authority of the agent to be in writing, so far as the rights of a vendor or purchaser who deals with the agent of another are concerned, would be to read into the statute something that is by no means either clearly or necessarily implied. The contract which the statute declares to be void unless in writing is one for the payment of a commission to the agent, but it does not say that the actual authority to sell or purchase must be in writing. California has a statute containing the exact words found in our own. Deering's Cal. Civil Code, § 1624, subd. 6. The California supreme court has recognized the force of the statute as applied to express contracts for the payment of commissions. *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. 523.

The above decisions are restricted to the one subject of the enforcement of contracts to pay commissions, and do not hold that the statute relates to the matter of an agent's actual authority to sell or purchase. That such could not have been the intention of the California statute is accentuated by the fact that the legislature of that state has passed another statute dealing directly with the authority of the agent which requires the authority to be in writing. Deer-

ing's Cal. Civil Code, § 1741. We do not appear to have such a statute in this state.

Appellant cites *Halsell v. Renfrow*, 14 Okl. 674, 78 Pac. 118, as supporting his contention that the agent's authority must be in writing. The opinion shows, however, that it is based upon a statute, and an examination of § 780, subd. 5, of Wilson's Revised and Annotated Statutes of Oklahoma, shows that the agent's authority is expressly required to be in writing and subscribed by the party sought to be charged. In *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471, this court said:

"The statute of frauds may be satisfied by the execution of a contract for the sale of lands by the hand of another person than the party to be charged, if that person be thereunto lawfully authorized, and it is well settled that such third person may be thus lawfully authorized orally, by written direction not under seal, and, even by a course of conduct amounting to estoppel."

The above rule was approved in *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565, and in *Monfort v. McDonough*, 20 Wash. 710, 54 Pac. 1121. It was therefore established in this state before the passage of the act of 1905, that oral authority to an agent is sufficient for him to bind his principal when as such agent he signs a memorandum in writing, and that the principal is thereby charged. It is true the statute of frauds requires that a contract for the sale of lands to be enforceable must be in writing, and it must be signed by the party to be charged or by some other person thereunto by him lawfully authorized. That the authority of such other person to sign may, however, be in parol unless prohibited by express statute, this court has already held as shown above, and we hold that the act of 1905, invoked here, has not changed the rule in that regard.

It is urged that the evidence here neither shows authority in the agent to make the contract, nor a ratification of it by appellant. It is not disputed that appellant expressly authorized Gregory to find a purchaser for at least practically

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all of the lots specified in the contract. Appellant claims that he reserved certain improved lots included in an enclosure wherein stood an office building, erected for the purpose of facilitating the sale of the lots in the addition. A local agent of appellant, who had been making miscellaneous retail sales of lots in the addition, also resided in the building. Gregory says, however, that this reservation was not made. Appellant also says that he expected Gregory to confer with the local agent as to lots already sold by him. It appears that the list which was used by Gregory was procured from the local agent, but it is claimed that the latter had contracted for the sale of some of the lots before the contract was made with respondent. The court found that the appellant authorized Gregory to find a purchaser for the unsold lots in the addition, and that there were then three hundred and sixty-eight unsold lots; that the price of the property was not then definitely fixed, but that Gregory was to fix a price and terms and get an offer; that he procured the offer from respondent alleged in the complaint, accepted it subject to confirmation by appellant, received \$500 on account of the cash payment, and executed and delivered to respondent a written memorandum signed by himself; that he thereupon informed appellant of what he had done; that appellant approved the same, and that he then informed respondent of such approval, that thereafter, and before the commencement of this action, appellant refused to carry out the contract, either by deed for the lots or by assignment of the Tacoma Land and Improvement Company contract. We think there is sufficient evidence to sustain the findings, and that we should not disturb them.

It is also contended that the contract is too indefinite to be enforced. The essential part of the written memorandum reads as follows:

“Tacoma, Wash., 2-19, 1906.

“Received of Joshua Peirce Five Hundred no 100 Dollárs Deposit on lots 368 lots in Barker’s Add. to Tacoma, Wash.,

as per schedule delivered him 2-16-06. (Here follows description of the lots) Price \$12,000.00 . . . Dollars Terms \$4,000.00 Cash, bal. as per contract with Tacoma Land Co., and provided no further payment within six months from date. Sold subject to approval of owner. "\$500.00."

It will be observed that the contract fixes the entire purchase price at \$12,000, and calls for a cash payment of \$4,000 with balance as per contract with Tacoma Land Company, and with the further provision as follows: "Provided no further payment within six months from date." It thus appears that a balance of \$8,000 was to be paid after the first cash payment. It is conceded that appellant's interest in the property was created by the land company's contract, payments upon which were yet to be made, and it is manifest from the memorandum delivered to respondent that payment of the balance unpaid upon that contract was to constitute a part of the \$12,000. The remaining payments upon the land company's contract were not yet due, and it is evident that respondent was to pay these as they became due. The memorandum concluded with the statement that no further payment was to be made within six months. The next payment upon the land company's contract matured, however, August 15, 1906, which was four days before the expiration of the six months from the date of the memorandum. It is apparent that that payment which was to be made "as per contract with Tacoma Land Co.," was required to be made before six months, and the concluding clause must therefore, by strict construction, be held to have referred to the payment of any additional part of the \$12,000 not covered by the unpaid balance under the land company's contract. We think it is apparent that the parties were not at the time advised of the exact balance under the land company's contract; that they estimated it to be about \$8,000; but that they intended to provide for its payment as it became due, and that any remaining part of the \$12,000, if

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any, should be ascertained and should be paid at the end of six months. The complaint alleges that the balance upon the land company's contract was \$7,500, but the evidence discloses that it was not so much. The full difference between \$8,000 and the actual balance upon the land contract was, however, payable six months from date of the memorandum. This suit was commenced and decree was entered before that time, and respondent was not under obligation to pay or tender the amount before bringing this suit. The decree provides that appellant shall assign and transfer to respondent all of his rights under the land company contract, and that respondent shall assume the obligations of appellant under the said contract. We think this is in accordance with the contract between the parties, the balance of the first cash payment having been paid into court. Respondent had made the payment required before the transfer was to be made and was entitled to the transfer. As to any balance that was to be paid appellant outside of the amount to the land company, we have seen that it was not yet due, and its payment was a matter for the future. Appellant claims that the amount is \$800, but that matter is not for our determination now. We simply find that the contract was sufficiently definite for specific enforcement, and that all payments that were due under it had been made or tendered prior to the decree.

It is contended that the evidence shows that appellant's local agent had contracted for the sale of seven, possibly nine, of these lots before the contract was made with respondent. Whatever may have been the fact in that regard, we think the decree does not prejudice appellant's rights. It calls only for the transfer from appellant to respondent of "all of the rights" of appellant "under said contract." If other persons had previously acquired from appellant rights under the same contract, they are not affected by the decree. If respondent does not get by the decree all for which his

contract calls, still if he is willing to accept the actual interest of appellant in the lots covered by the contract, appellant cannot complain.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, DUNBAR, and CROW, JJ., concur.

[No. 6310. Decided November 9, 1906.]

GEORGE U. CURTIS, *Respondent*, v. BARBER ASPHALT
PAVING COMPANY *et al.*, *Appellants*.¹

EVIDENCE—HYPOTHETICAL QUESTIONS—OPINIONS AS TO CONTRIBUTORY NEGLIGENCE—ADMISSIBILITY. In an action for damages sustained through the breaking down of a bridge under the weight of plaintiff's load and team, it is error to permit a witness to answer a hypothetical question as to whether the driver of the team on such a bridge should have known of the danger; since that would be the opinion of a witness as to plaintiff's contributory negligence, and involved no question of science or peculiar knowledge.

APPEAL—REVIEW—ADMISSION OF EVIDENCE—HARMLESS ERROR. The admission of improper evidence which invaded the province of the jury in giving the opinion of a witness as to plaintiff's contributory negligence cannot be ground for reversal, where the appellant upon cross-examination put similar improper questions and had the benefit of the opinion of the witness on another theory of the case; especially where the answers were so manifestly proper that they could not be prejudicial.

NEGLIGENCE—COLLAPSE OF BRIDGE—DUTY TO SUPPLY SAFE PLACE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE. Where a paving company uses an old bridge for a dumping place for gravel delivered by teamsters of an independent contractor, it owes the duty to see that that place is reasonably safe, and it cannot be said that a teamster, in hauling his second load onto the bridge, assumed the risk or was guilty of contributory negligence, unless he had knowledge of the dangerous condition of the bridge and of the paving company's failure to discharge its duty.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions that are covered in the general charge.

¹Reported in 87 Pac. 345.

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Opinion Per RUDKIN, J.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 27, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in the collapse of a bridge. Affirmed.

Bamford A. Robb and Charles P. Harris, for appellants.
Govnor Teats, for respondent.

RUDKIN, J.—This was an action to recover damages for personal injuries resulting from a fall through a bridge in the city of Tacoma. The bridge was a wooden structure, about two hundred feet in length, varying from twelve to thirty feet above the gulch which it spans, and was constructed about fifteen years ago. In the month of July, 1905, the defendant Barber Asphalt Paving Company was engaged in paving North K street, in close proximity to this bridge, under a contract with the city of Tacoma, and the defendant Anderson was the superintendent in charge of the work. By direction of the defendants, the gravel used in the work of paving the street was delivered on this bridge by teamsters in the employ of an independent contractor, and was removed from the bridge to the street by the workmen in charge of the paving. On the morning of July 12, the plaintiff, who was one of the teamsters engaged in hauling gravel, drove his team onto the bridge, by direction of the checker in the employ of the Asphalt Company, and as he did so, the weight of his load and team, coupled with the weight of the gravel already on the bridge, caused a span of the bridge to break and give way, precipitating the plaintiff, his load, team and wagon, to the bottom of the gulch beneath the bridge, thereby causing the injuries complained of in this action.

A trial was had before a jury, resulting in a verdict in favor of the plaintiff for the sum of \$5,000. On motion for a new trial the court required the plaintiff to remit the

sum of \$2,000 from the verdict, or a new trial would be ordered. Plaintiff elected to remit the \$2,000, and judgment was entered on the verdict for the residue. From this judgment the defendants have appealed.

Errors are assigned in the admission of testimony, in denying a motion for a nonsuit and a challenge to the sufficiency of the testimony, in refusing certain instructions requested by the appellants, and in overruling the motion for a new trial.

A. U. Mills was called as a witness on the part of the respondent. On redirect examination, a hypothetical question was propounded, to which an objection was interposed and overruled. The question covers nearly a page of the transcript, and need not be stated here. Suffice it to say, the question sets forth nearly every possible phase of the case from the standpoint of the respondent, and concludes as follows: "Now, under these circumstances, I will ask you whether or not a driver should know that that place was a dangerous place to unload his gravel?" This question was manifestly improper, and the objection should have been sustained. In substance the inquiry was whether, in the opinion of the witness, the respondent would be guilty of contributory negligence under a given state of facts. No question of science or of technical or peculiar knowledge was involved, and the admission of the testimony was a palpable invasion of the province of the jury.

The question, however, was little more objectionable than similar questions propounded to the same witness on cross-examination. Thus the witness was asked: "Then to a man who understands bridge building, and knows what bridges are constructed for and so forth, he would see right in the face of it it would be dangerous to drive on such a bridge as that with a heavy load?" And again: "And then, for instance, you were driving a team loaded with gravel that weighed five tons, you would know it would be dangerous

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to drive onto a bridge having already from ten to fifteen tons dead weight on it in one spot?" The appellants had the benefit of the opinion of the witness on one theory of the case, and they are in no position to complain if the respondent was accorded the benefit of a similar opinion on a different theory. Furthermore the answer given to the question as propounded was so manifestly proper that no prejudice could result from the ruling.

The appellants assign as error the refusal of the court to grant a nonsuit, the refusal to sustain a challenge to the sufficiency of the evidence, and a refusal to instruct the jury to return a verdict for the appellants. These assignments present but a single question, and may be considered together. The appellants contend that it appeared from the testimony of the respondent himself that he assumed the risk or was guilty of contributory negligence, and several pages of his testimony are quoted to sustain this view. The respondent was not in the employ of the appellants, and perhaps the doctrine of assumption of risk, as that term is understood in the law of master and servant, has no application. But whether we consider the defense as based on the doctrine of assumption of risk, or upon the maxim *volenti non fit injuria*, or upon contributory negligence, we do not think that the contention of the appellants can be sustained. They were using the bridge in question for a private purpose and it was incumbent on them to see that it was, or was made, reasonably safe for that purpose, and to exercise ordinary care in that regard.

The respondent, on the other hand, had a right to assume that the appellants had taken proper precautions for his safety and that the bridge was reasonably safe as a dumping place for the gravel. He did not assume the risk arising from the negligence of the appellants in failing to furnish a safe place, unless he was aware of such negligence; and for the same reason he cannot be said to have consented to

the injury, unless he had knowledge of the dangerous condition of the bridge and the failure of the appellants to discharge their duty toward him. While the respondent was a bridge carpenter, and had more or less experience in the construction of bridges, and more or less knowledge as to their strength and carrying capacity, yet this was the second load he hauled onto the bridge; and it cannot be said as a matter of law that he knew, or should have known with the opportunities present, that the bridge was unsafe, or that the appellants were leading him into a veritable death-trap. For these reasons, there was no error in the rulings complained of.

Error is assigned in the refusal of three requests for instructions, but an examination of the general charge of the court shows that the requests were given in substance, and this is all the law requires. The error in denying the motion for a new trial is based upon the claim that the verdict is still excessive. The testimony shows that the respondent was seriously if not permanently injured, and the verdict as reduced by the trial court is not, as a matter of law, excessive. Finding no reversible error in the record the judgment is affirmed.

MOUNT, C. J., DUNBAR, FULLERTON, and HADLEY, JJ., concur.

CROW and ROOT, JJ., took no part.

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[No. 6284. Decided November 9, 1906.]

F. B. LAZIER, *Respondent*, v. R. W. CADY and L. H. HIGGINS
(*Intervener*): *Appellants*.¹

VENDOR AND PURCHASER—FRAUD OF VENDOR—RECOVERY OF PURCHASE PRICE. The part owner of land who was induced to sell at a low price through the fraudulent representations of his co-owner as to the amount that is to be obtained through a contemplated sale, is entitled to recover from the purchaser, after such sale, the amount of the unpaid purchase price, to the extent of his portion of the profits.

EVIDENCE—RECEIPT—ORAL EVIDENCE OF CONTRACT. A receipt for \$1,000, reciting that it was in part payment for certain land, does not preclude oral evidence of the actual contract of the parties where the same is consistent with the terms of the receipt.

DEPOSIT IN COURT—FRAUD—EQUITY. In an action by a vendor to recover purchase money, obtained by fraud in the sale of lands, the amount tendered and deposited in court by an intervener, claiming as successor in interest of the defendant, and which was not accepted, cannot be awarded to the plaintiff, upon judgment against the defendant, but belongs to the intervener.

Cross-appeals from a judgment of the superior court for Pierce county, Huston, J., entered March 19, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover the amount due from the sale of land. Affirmed in part and reversed in part.

Ellis & Fletcher, for appellant Cady.

Charles O. Bates, for intervener.

William L. Waters and *Harry H. Johnston*, for respondent.

RUDKIN, J.—On the 20th day of January, 1906, the defendant Cady, acting for himself and the plaintiff Lazier, purchased an option on eight acres of tide land, in Pierce

¹Reported in 87 Pac. 344.

county, for the sum of \$100. The option contract provided that the holder of the option might purchase the land within thirty days at \$2,500 per acre, or \$20,000 in all, the terms of payment to be \$4,900 cash at the expiration of the option, and the balance in three equal installments of \$5,000 each, payable in six months, one year and two years respectively. On January 22, 1906, the plaintiff paid to the defendant Cady his one-half of the option money, and took a receipt acknowledging that the plaintiff held an undivided one-half interest in the option. The plaintiff resided in the city of Seattle, and the defendant Cady in the city of Tacoma.

On the morning of February 7, 1906, the defendant Cady refused a *bona fide* offer of \$4,000 per acre for the land, and refused to sell for less than \$5,000 per acre. On the afternoon of that day, Cady went to Seattle and called upon the plaintiff. He informed the plaintiff that a considerable portion of the time allowed under their option had elapsed, and that the prospects for the sale of the land were not good; that he had heard nothing that would lead him to believe that the land had materially increased in value; that he had just given an option on the land which would net each of them \$1,000, and had received \$100 on account of the option; that this option would expire at 10:00 o'clock on the following morning, and that he had come to Seattle to secure the plaintiff's ratification of the option, believing that this was the best they could do under the circumstances. The plaintiff had no knowledge of the offers which had already been made for the land, and knew nothing of its value; and, relying upon the representations of the defendant Cady, he assented to the option which Cady claimed to have given, and received \$50 as his share of the option money, taking the following receipt therefor:

"Seattle, Wash., Feb. 7, 1906.

"Received of R. W. Cady Fifty dollars (\$50.00), option money in part payment on One thousand (\$1,000.00) dollars for F. B. Lazier's interest in an option taken by R. W. Cady

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on the following described land, to-wit: Eight acres in Lot One in the Northeast of the northeast of the northeast of section ten, Town. 20, North of Range 3 east.

"F. B. Lazier."

Thereafter, and before the first-mentioned option had expired, the defendant Cady sold the land to the defendant Alexander for the sum of \$35,000, or at a profit of \$14,000 over and above the original purchase price and commissions on the resale. He thereafter refused to pay to the plaintiff any portion of the profits thus received. The defendant Alexander paid the defendant Cady \$13,000 of the purchase price, assumed the \$15,000 in deferred payments, and still retained in his hands \$7,000 of the purchase price at the time this action was tried.

The original complaint in the action set forth the foregoing facts in substance. The prayer of the complaint was for a judgment of \$7,000 against the defendant Cady, and for an order restraining the defendant Alexander from making further payments to the defendant Cady, and requiring him to pay the residue of the money into court. The record shows no answer or other pleading on the part of the defendant Alexander. The defendant Cady answered, but inasmuch as he disclaimed any interest in the fund in court his answer need not be further considered. L. H. Higgins by leave of court intervened in the action, and in his complaint in intervention alleged that he had purchased the interest of the plaintiff in the option in controversy through the defendant Cady, under the receipt above set forth for the sum of \$1,000, and that he had repaid the defendant Cady the sum of \$50 theretofore paid to the plaintiff on account of such sale. He tendered into court the sum of \$950 as the balance due on such sale, and prayed judgment that the fund might be awarded to him. The court found the facts as set forth in the complaint, directed the defendant, Alexander, to pay the balance of \$7,000 into court and directed the clerk of the court to pay to the plaintiff, not only the \$7,000

paid in by Alexander, but the \$950 paid in by the intervener as well. From this judgment, the defendant Cady and the intervener, Higgins, have each appealed.

As stated above, the appellant Cady has disclaimed any interest in the fund in controversy, and his appeal will therefore not be considered. The findings of fact are fully sustained by the testimony, and we see no reason why the decree awarding the \$7,000 remaining due on the tide land sale to the respondent should be disturbed. The court found that the appellant Cady misinformed the respondent as to the contents of the receipt of February 7, 1906. We do not deem it necessary to consider or decide whether the respondent should be permitted to contradict or vary the terms of the receipt under the circumstances stated, as we are clearly of opinion that the receipt itself does not preclude parol evidence of the actual agreement between the parties. Indeed, the testimony of the respondent and his witnesses as to the circumstances surrounding the giving of the receipt and the actual agreement of the parties is fully as consistent with the terms of the receipt as is the claim of the appellants. The receipt does not contain the terms of any contract nor preclude oral evidence as to the actual agreement of the parties, and the court was fully warranted in finding that there was in fact no sale from the respondent to the intervener.

The intervener further contends that this was an action to set aside a sale, and that the respondent should have tendered back the \$50 received from Cady on account of the sale. Cady has disclaimed and is not here complaining. Furthermore he received his \$50 back from the intervener, and if the intervener paid Cady the sum of \$50 in furtherance of their common design to defraud the respondent, a court of equity will not lend its aid to recover it. As between the respondent and the intervener, the judgment awarding the \$7,000 to the former is clearly right. The court, however, went further and awarded to the respondent the \$950 which

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the intervener paid into court in support of his claim that he had purchased the interest of the respondent. The respondent himself never accepted the tender, and could not do so without waiving his claim to the other fund in court. The \$950 fund was at all times the property of the intervener and still remains so. The respondent cites authorities holding that, where money is paid in pursuance of an illegal contract, a court of equity will not aid the party who makes the payment to recover it. These cases are perhaps good law, but they have not the slightest application here. The intervener is not asking the aid of a court of equity to recover money which he has paid to another; he is simply protesting against the action of the court in awarding his money to one who has no conceivable claim thereto.

For the foregoing reasons the judgment is affirmed as to the appellant Cady, and the respondent will recover from him one-half his costs on this appeal. As to the appellant Higgins, the judgment is affirmed as to the award of the \$7,000, but as to the award of the \$950, the judgment is reversed, and the intervener will recover his costs on appeal from the respondent. The case will be remanded to the court below with directions to modify its decree as above indicated.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

Crow and Root, JJ., took no part.

[No. 6243. Decided November 10, 1906.]

BRIDGET COSTELLO *et al.*, *Appellants*, v. DRAINAGE DISTRICT
No. 1, KING COUNTY, *et al.*, *Respondents*.¹

APPEAL—RECORD—AFFIDAVITS—ORAL STIPULATIONS. The supreme court cannot take cognizance of an oral stipulation sought to be shown by an affidavit which is controverted by the other party.

APPEAL — RECORD — STATEMENT OF FACTS — TIME FOR CERTIFYING. Under Bal. Code, § 5058, notice of application to settle and certify a statement of facts on the eighth day after filing confers no jurisdiction to settle the same, and the adverse party is under no obligation to notice or move against such application in the lower court.

Appeal from an order of the superior court for King county, Yakey, J., entered April 18, 1906, granting to defendants a new trial for errors in the admission of testimony. Affirmed.

Vince H. Faben, for appellants.

Ballinger, Ronald, Battle & Tennant, for respondents.

RUDKIN, J.—This is an appeal from an order granting a new trial for errors in the admission of testimony. The respondents interpose a motion to strike the statement of facts and affirm the order, for the reason that the statement was not settled or certified in the manner required by law, and the judge certifying the same had no jurisdiction to settle and certify the statement at the time the same was so certified. If the statement of facts be stricken, the errors assigned in the granting of the new trial cannot be considered, and the order must be affirmed.

It appears from the record that the order granting the new trial was entered on the 18th day of April, 1906. The proposed statement of facts was filed, and served on the respondents, on the 25th day of April, 1906. On the 28th day

¹Reported in 87 Pac. 513.

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of April, 1906, the appellants served a written notice on the respondents that they would apply to the judge before whom the cause was tried, on the 3rd day of May, 1906, at the hour of 9:30 a. m., to settle and certify a statement of facts in said cause. The statement was certified pursuant to such notice on the last-mentioned date, in the absence of the respondents or their attorneys. No amendments to the statement were proposed by the respondents either before or after the statement was settled and certified. It will thus be seen that notice of the application to settle and certify the statement was served three days after the filing, and the statement was actually settled and certified on the eighth day after filing, or two days before the expiration of the time allowed by law for proposing amendments. An affidavit was filed in this court, on the part of the appellants, tending to show that there was an oral agreement or stipulation between counsel for the respective parties that the statement might be settled and certified at the time specified in the above notice, but this is controverted by the respondents, and courts uniformly refuse to take cognizance of oral stipulations under such circumstances.

Bal. Code, § 5058 (P. C. § 675), provides that a party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service, any other party may file and serve on the proposing party any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending, or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment

made by order or stipulation, the judge shall settle and certify the bill or statement. If no amendments shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to, and shall be certified by the judge at the instance of either party, at any time thereafter, without notice to any other party.

Under the foregoing provisions, it would seem clear that notice of an application to settle and certify a statement of facts on the eighth day after filing is ineffectual for any purpose, and confers no jurisdiction upon the court or judge. The adverse party is under no obligation to respond to such a notice, and the certificate to the statement will have no greater force or effect than if made without notice. It would seem equally clear that a statement of facts can only be certified within the ten days allowed for proposing amendments thereto by consent of all the parties who have appeared in the action, unless amendments have been proposed or waived. True, the respondents might have moved against the certificate, or proposed amendments, notwithstanding the statement had already been certified, but they were under no obligation to do so. It seems to be conceded that the certificate to the statement would be ineffectual had the respondents proposed amendments to the statement within the ten days allowed by law, and, if so, how could a valid certificate be invalidated; or, on the other hand, how could a certificate, invalid when made, be validated thereafter by a mere failure of the respondents to propose amendments to a statement of facts which had already been certified?

We are therefore of opinion that the statement of facts was settled and certified without authority of law, and that the motion to strike the statement and affirm the judgment should be granted, and it is so ordered.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

FULLERTON, J., dissents.

CROW and ROOT, JJ., took no part.

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[No. 6493. Decided November 10, 1906.]

W. E. STEVENS, *Respondent*, v. ELIZABETH G. KITTREDGE
et al., *Appellants*.¹

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—MUTUALITY—PART PAYMENT—TENDER. There is no lack of mutuality upon the part of the vendee, in a contract for the conveyance of real estate, where he has paid part of the purchase money, repeatedly expressed willingness to pay the balance, and tenders the same in court.

SAME—HUSBAND AND WIFE—COMMUNITY PROPERTY—AUTHORITY. A husband cannot claim that his wife was not authorized to sell community land, where the contract was made up of telegrams, one of which he answered, a deed was executed by both in accordance with the contract, and both had full knowledge of the pending sale, which was repudiated by the wife and not by the husband.

VENDOR AND PURCHASER—CONTRACT TO CONVEY—RESCISSION BY VENDOR—DELAY OF VENDEE. Delay by the vendee to close a sale is not ground for rescission by the vendors, where the delay was caused by the vendors' failure to secure the satisfaction of a mortgage upon the property.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 9, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for the specific performance of a contract to convey real property. Affirmed.

H. R. Clise and George H. King, for appellants.

Ballinger, Ronald, Battle & Tennant, for respondent.

RUDKIN, J.—This was an action for the specific performance of a contract for the sale of real property. The contract relied on consists of numerous letters and telegrams which are too voluminous to set forth in detail in an opinion. The defendants were the owners of two certain lots in the city of Seattle, and, during the period covered by the negotiations following, resided in the city of Detroit, Michigan.

¹Reported in 87 Pac. 484.

Some time prior to September 4, 1905, George W. Dilling, a real estate agent of Seattle, wrote the defendant Elizabeth G. Kittredge concerning the sale of the two lots. Under the above date, Mrs. Kittredge wrote Dilling that the lots were for sale if a proper price could be obtained. She stated that she had been absent from Seattle for some time, that realty values had changed, and asked what the property was worth. Dilling replied, under date of September 13, informing her that certain lots in the vicinity had sold for \$13,000, net, that certain other lots were for sale at \$14,000, but he preferred that she should fix her own price. Mrs. Kittredge replied, under date of September 23d, that she would sell for \$16,000, giving a clear title, and would consider any reasonable offer.

On November 7th, Dilling wired Mrs. Kittredge that he had an offer of \$14,000 for the lots, she to pay a commission of \$600. The following day the defendant R. B. Kittredge wired back that they would accept \$14,000, no commission. In reply Dilling wired the defendant R. B. Kittredge that he could not raise the offer, but would reduce commission to \$300. On the following day Mrs. Kittredge wired Dilling that the offer was accepted, and to make deposit with the Washington Trust Company. On the same day she wired the Washington Trust Company that she had sold Dilling the lots, and to accept deposit pending delivery of papers through the Trust Company. Dilling then notified the plaintiff that his offer had been accepted. The plaintiff paid Dilling \$500 on account of the purchase price, and the amount was deposited with the Trust Company. The Trust Company receipted for the amount, the receipt setting forth the terms upon which the deal should be closed.

On receipt of the deposit, the Trust Company wired Mrs. Kittredge that the deposit had been made, and to send abstract. A letter of similar import was mailed the same day. On November 10th, Mrs. Kittredge wired the Trust Com-

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pany that the abstract would be forwarded from San Francisco. On the same date she wrote the Trust Company that a Mr. Johnson of San Francisco held the abstract, as there was a mortgage on the property in favor of Miss Kittredge, a sister of her husband. She asked the Trust Company to take charge of the sale and report progress to her. On November 10th Dilling wrote Mrs. Kittredge that he had sold the lots to the plaintiff, that the plaintiff had paid \$500 as earnest money, and would pay the balance of the purchase price in cash upon the receipt of a deed and abstract showing clear title. He enclosed a deed of the property to be executed by both defendants, and returned to the Trust Company. On November 11th Mrs. Kittredge wrote the Trust Company to take up a \$6,000 mortgage on the property, and, when final settlement was made, to deposit balance to her credit. On November 16th she again wrote the Trust Company acknowledging receipt of the deed from Dilling, and stating that she would return same by registered mail on the following day. On the same date she also wrote Dilling acknowledging receipt of deed, and stating that she would return same, with all papers of any benefit to the intending purchaser, to the Trust Company on the day following. On November 20th Mrs. Kittredge wrote the Trust Company that she had received word from San Francisco that the abstract had been forwarded. She also enclosed an insurance receipt and asked the Trust Company to request the plaintiff to pay the amount due on the policy, and if he refused, to collect from the Insurance Company. On November 18th Dilling received the abstract from the Trust Company. The abstract was thereupon brought down to date, and delivered to the attorneys for the purchaser on November 24th. On November 25th, the attorneys completed their examination of the abstract and reported the title clear, except a street grade assessment, and the mortgage to Miss Kittredge above referred to.

On November 27th the plaintiff notified Dilling that he was ready to pay the balance of the purchase price and close the sale, but upon inquiry from the Trust Company it was learned that the mortgage release had not yet been received. Again, on November 29th, the plaintiff announced his readiness to close the deal, but still the release had not come. A similar offer was made on December 4th with the same result, and the plaintiff thereupon offered to pay the entire balance of the purchase price to the Trust Company, receive the deed, and trust to the Trust Company to place the release of mortgage on record as soon as it was received, but this the Trust Company refused to do. Finally, on December 7th, Mrs. Kittredge wired the Trust Company that if the sale was not closed to hold the papers subject to her order. After further negotiations, not necessary to be detailed here, the defendants refused to perform the contract or deliver the deed, and the plaintiff brought this action for specific performance, averring his readiness to pay the balance of the purchase price. The court below, on the foregoing stipulated facts, entered judgment in favor of the plaintiff, and from this judgment the present appeal is prosecuted.

While this mass of correspondence would seem to leave little room for fraud or perjury, yet the appellants earnestly insist that there is no contract which they are obligated to perform. We will therefore consider briefly the different objections urged in their behalf. It is first contended that there is a lack of mutuality in the contract, that the respondent was not obligated to pay the purchase price and therefore the appellants are not obligated to convey. The respondent has paid a part of the purchase price, has repeatedly expressed his readiness to pay the balance, and now tenders the same into court. This supplies any lack of mutuality in the contract under the ruling of this court. *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338; *Conner v. Clapp*, 42 Wash. 642, 85 Pac. 342.

It is next contended that the appellant R. B. Kittredge at least is not bound. While the property is presumed to be community, and the negotiations were conducted almost entirely by the wife, yet it will be remembered that the husband answered a telegram sent to the wife in relation to the sale, and the wife answered a similar telegram sent to the husband. Husband and wife executed a deed and sent it to the Trust Company for delivery, and finally it was the wife and not the husband who repudiated the sale. Both husband and wife unquestionably had full knowledge of the pending negotiations, and each fully ratified the acts of the other. *Washington State Bank v. Dickson*, 35 Wash. 641, 77 Pac. 1067.

The final contention is that the respondent did not perform the contract as soon as he should. The cause of the delay is so apparent from the foregoing statement that argument or discussion is unnecessary. There is no merit in the appeal, and the judgment is affirmed.

MOUNT, C. J., DUNBAR, ROOT, CROW, FULLERTON, and HADLEY, JJ., concur.

[No. 6474. Decided November 10, 1906.]

THURSTON COUNTY *et al.*, Appellants, v. TENINO STONE
QUARRIES, INCORPORATED, Respondent.¹

TAXATION—POLL TAX—UNIFORMITY—CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO LEVY. A poll tax may be restricted to males over twenty-one years of age and under fifty, since the state constitution does not require uniformity therein, but the same may be by appropriate classification; and the above is not unreasonable or unjust.

SAME—PROCEEDINGS TO COLLECT—CONSTITUTIONAL LAW—TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW—STATUTES—CONSTRUCTION. The provision in the poll tax law requiring an employer to ascertain the names and pay the poll tax of all his employees subject thereto, under penalty of fine or imprisonment, is not a taking

¹Reported in 87 Pac. 634.

of his property without due process of law in that it compels the payment without giving him or his employee his day in court, in view of Bal. Code, p. 223, § 4, and Bal. Code, §§ 4843-4845, providing for the institution of civil actions to collect the tax, wherein the employer may deposit the same in court, without incurring expense or liability for costs, and the employee can have his day in court.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered August 3, 1906, upon sustaining a demurrer to the complaint, dismissing an action for the collection of road poll taxes. Reversed.

P. M. Troy, for appellants.

Vance & Mitchell, for respondent.

Root, J.—This action was commenced by appellants for the collection of road poll taxes under the provisions of the statutes as found in the Laws of 1903, page 223, and as amended in 1905, and appearing at page 297 of the published Session Laws of 1905. The poll taxes sought to be collected were those alleged to be due from certain employees of respondent. The trial court held the statute unconstitutional. From a judgment dismissing the action, this appeal is taken.

Section 1 of the act of 1903, as amended in 1905, reads as follows:

“Every male inhabitant of this state between the ages of twenty-one and fifty years, outside the limits of an incorporated city or town, shall annually pay a road poll tax of two dollars, which shall be due and payable in money without exemption whatsoever on the first day of March in each year. All poll taxes shall be paid into the district road and bridge fund of the district in which the same shall be collected.”

It is contended by respondent that this section of the statute is invalid, as being in conflict with §§ 3 and 12 of art. 1 of the state constitution, and contrary to the fourteenth amendment of the Federal constitution. The sections of the state constitution referred to are as follows:

“Sec. 1. No person shall be deprived of life, liberty or property without due process of law.

"Sec. 12. No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

In the able briefs presented by each side, the case of *State v. Ide*, 35 Wash. 576, 77 Pac. 961, is cited and relied upon. That was a case involving the validity of an ordinance of a city of the third class, which provided for the collection of a poll tax from every male inhabitant of the city between the ages of twenty-one and fifty years and not a member of any volunteer fire company of the city. Said ordinance was enacted pursuant to the provisions of Bal. Code, § 938 (P. C. § 3488). Said statute was necessarily limited by § 9 of art. 7 of the state constitution, which provides that:

"For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

It was urged by the appellant in that case—and the contention was upheld by this court—that the legislature, under the constitutional provision just quoted, had no power to authorize a municipality to enact an ordinance for the levying and enforcement of a poll tax that was not uniform as to persons; that the provision in the ordinance excepting females, firemen, and males over fifty and under twenty-one years of age, rendered said ordinance obnoxious to this section of the constitution. The following excerpt from the opinion, rendered in that case, will show what was there involved.

"While it is conceded by counsel for appellant that the legislature may, in the absence of constitutional restrictions, 'confer upon a city almost supreme power over local taxation,' yet they contend that the tax in question, by reason of its lack of uniformity, is repugnant to § 9 of art. 7 of our constitution, and therefore void. That section of art. 7 reads as follows: 'The legislature may vest the corporate

authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.' Section 12 of art. 11, of the constitution, provides that, 'The legislature shall have no power to impose taxes upon . . . cities . . . or the inhabitants or property thereof, for . . . city . . . purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.' These two provisions are the only ones relating to the vesting of the power of taxation in municipal corporations. And they clearly indicate, especially the latter, that the legislature may authorize the taxation, by cities, of persons, as well as property, within their limits. Conceding, as we must, that the legislature had the right to delegate to cities of the third class the power to levy poll taxes on the inhabitants thereof, the question naturally arises whether, in this instance, they exercised the power in conformity with the constitution."

It is suggested by appellants, and conceded by respondent, that § 9 of art. 7 does not apply to the facts of the case at bar, and further, that there is no provision in the state constitution requiring a poll tax to be uniform as to persons unless §§ 3 and 12 of art. 1 have that effect.

The power to levy and enforce the payment of taxes is an incident of sovereignty, and under a state constitution like ours, is vested in the law-making department of the government. In the absence of any constitutional inhibition, it must be conceded that the legislature may provide for the levy and enforcement of a poll tax upon any or all of the citizens of the state, regardless of the question of uniformity. We are, therefore, brought to the question of whether said §§ 3 and 12, of art. 1, are infringed by the statute now before us. Respondent urges that the statute, by limiting the tax to male inhabitants between the ages of twenty-one and fifty,

discriminates in favor of, and extends a special privilege and immunity to, all other inhabitants, within the meaning of the constitutional provision above cited, and that the enforcement of such a statute would, in effect, amount to the taking of property without due process of law.

Appellants maintain that the nature and purpose of a poll tax is such that its application should not be universal, but by means of appropriate classifications, and that this requirement is fittingly and legally observed in the statute in question. We think this contention is sound and should be upheld. The propriety of the enactment and enforcement of statutes providing for a poll tax has been recognized ever since, and prior to, the foundation of our government. In our own commonwealth the first statute of this character was enacted in 1854, Laws 1854, page 331. In this and many other states, classifications similar to that here found have been provided. The reason for such classifications is found in the nature of the subject-matter itself. It was formerly the common practice, and is yet, if we are not incorrectly informed, for persons subject to poll tax to "work out" said tax upon the public highways. The inappropriateness of women being called upon to render such a service to the state is readily apparent. Other reasons for the exemption of females may be found in the fact that by law they are denied various privileges held and exercised by males, upon whom this tax may be levied, and it has always been the policy of the law to show some deference to women, by reason of the physical limitations imposed by nature. That there is an age when, by reason of immaturity, the imposition of this public service or tax should not be made, is evident, as is, likewise, the proposition that an age may be reached when a man should not be called upon to render this character of services, or pay a *per capita* tax. It is contended that the fixing of the ages at twenty-one and fifty is arbitrary. This is true; but the nature of the subject-matter makes it essential that arbitrary limits should be established. The same con-

tention might be made with reference to the statute which fixes the completion of twenty-one years as prerequisite to the privileges and obligations of legal manhood. Similar statutes limit the years during which one may become, or may be required to become, a member of the militia, or to serve upon a jury. It is doubtless true that people between the ages of twenty-one and fifty years, as a class, use the highways much more than those below the one, or above the other, of the limits mentioned.

Anent the arbitrariness of this law, respondent suggests this question: "Why should a man forty-nine years of age, living upon his farm by the side of a certain road, be compelled to pay a poll tax, while his brother, fifty-one years of age, with equally good health and strength, living upon an adjoining farm of like character and equal value, by the side of the same highway, is not subjected to such exactment?" The answer is simply this: Under such a law the older brother would have been subject to such tax for two years before the younger became of age. The latter will be exempt when he shall have completed the period through which the other has passed. The character and value of the property of each has no bearing upon the question. The underlying nature and purpose of a poll tax are disassociated entirely from any consideration of property. The state accords to every inhabitant, regardless of his property possessions, the protection and advantages of its laws and public institutions. By reason of these personal guaranties and benefits, it asks a tribute toward the support of the government from those beneficiaries who are physically qualified to contribute. It would be impracticable to examine and pass upon the physical ability of every individual to earn or pay this capitation tax. Hence, the adoption of a classification becomes imperative. That the average man between the ages of twenty-one and fifty is physically able to readily earn and contribute the amount of this tax must be conceded. That the average person in any of the three classes composed, re-

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spectively, of women, males under twenty-one and males over fifty, is by nature or less able physically to do work or earn money, is self-evident. These distinctions, based upon the laws of nature, are such as the legislature was abundantly justified in recognizing.

“When the power of taxation is exercised considerations of public policy must dominate; and the only rule of equality in respect to taxation is that the same means and methods shall be applied impartially to all constituents of each class, so that the law shall act equally and uniformly upon all persons in similar circumstances.” 8 Cyc. 1071.

Other states with similar constitutional provisions have, for scores of years, maintained and enforced poll-tax statutes with practically the same classification as found in this. Long acquiescence in the existence and enforcement of such enactments is evidence that they have not been deemed obnoxious to constitutional limitations. *Faribault v. Misener*, 20 Minn. 396; Cooley, Const. Lim. (6th ed.), 81-85. Had the people, when preparing and adopting our state constitution, desired to change or avoid this kind of classifications in poll-tax statutes they would doubtless have used appropriate language to have clearly expressed such purpose. In view of these, and other considerations that might be mentioned, we do not think that the classification made by this statute was unreasonable, unjust or illegal.

It is further contended by respondent that § 3 of the act of March 16, 1903, page 223, Laws of 1903, is unconstitutional in that its enforcement would constitute a taking of property without due process of law. Said section of the statute reads as follows:

“Any person, firm or corporation or company, or agent thereof, having persons in his or their employ liable to pay a poll tax as hereinbefore provided, shall upon demand duly made by such collector, furnish a list showing the names of all persons so employed, and the wages due and owing to each of such employees, and if the amount of said poll tax be then

due it shall be paid at once to the collector by said employer. Any such employer refusing to furnish such list upon demand shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding one hundred dollars, and may also be imprisoned in the county jail not exceeding one month. And any payment made by said employer as herein provided shall be a complete defense in any suit or action brought by the employee for such sum or sums."

It is argued that no provision is made for testing the correctness of an employee's poll tax sought by this statute to be enforced against his employer, and that the payment by the latter would not be binding upon such employee for the reason that he would be without his day in court, and could recover from his employer the amount of such tax paid without his direction. In support of this contention, respondent cites the case of *Baldwin v. Moore*, 7 Wash. 173, 34 Pac. 461, where this court held that a statute forbidding the county auditor to file a deed conveying any property upon which there were unpaid taxes was unconstitutional. We do not think that decision is applicable to the facts of this case. In the statute there under consideration there was no provision made for any judicial proceeding, or other means of ascertainment by the auditor, as to the correctness or legality of the tax shown by the record. He was arbitrarily commanded to refuse the registration of a deed if the tax records showed an unpaid tax, regardless of what he believed or knew as to the invalidity of such tax or apparent tax. In the case at bar, it is the duty of the employer to ascertain who of his employees are subject to this tax, and he is not required to put upon the list the name of any servant who is not liable to pay such poll tax. If, after making a proper investigation, he reports one of his employees as liable for the payment of a poll tax, when, as a matter of fact, such employee is not liable, the consequence must be attributed to his mistake, as in any other case of error, and not to any fault in the law. If, upon investigation, he finds that one of his em-

ployees claims to be not liable for said tax, and he has any reason to believe such contention correct, he may so report or refuse to put the name of such employee upon the list required by the statute. If he is sued by the county for the poll tax of an employee who claims to be not liable, and as to whose liability the employer has a doubt, he may pay the amount of such poll tax into the court where the county may summon said employee to participate in a hearing as to his liability. Bal. Code, §§ 4843, 4844 (P. C. §§ 582, 584). Section 4 of the act of 1903, page 223, Laws of 1903, reads as follows:

“The county commissioners or any poll-tax collector may in the name of the county where any poll tax is sought to be collected, invoke in the collection of such tax any process of civil procedure authorized by law. Public officers of this state shall render any service demanded by the commissioners or any collector duly authorized by them, without charge or fee of any kind: *Provided*, That the county commissioners may allow in the case of public officers who receive their compensation by fees such allowance chargeable against the taxes as they may deem just.”

It will thus be seen that this section authorizes the bringing of an action by the county commissioners, or poll-tax collector, whenever a poll tax is sought to be collected. This affords an opportunity to test the legality of the tax. In this particular the statute is entirely different from that involved in the case of *Baldwin v. Moore*, *supra*, where no such provision existed. Section 4844, *supra*, reads as follows:

“In all actions commenced under the preceding section, the plaintiff may disclaim any interest in the money, property, or indebtedness, and deposit with the clerk of the court the full amount of such money or indebtedness, or other property, and he shall not be liable for any costs accruing in said action. And the clerks of the various courts shall receive and file such complaint, and all other officers shall execute the necessary processes to carry out the purposes of this section, and also sections 4843 and 4845, of this code, free from all

charge to said plaintiff, and the court, in its discretion, shall determine the liability for costs of the action."

Under this section the employer can, without any costs, avoid responsibility in any case where his employee disputes the legality of his poll tax; and the employee can likewise have his day in court. Perceiving nothing calculated to infringe the constitutional guaranties, and recognizing the principle that a legislative enactment should be held unconstitutional only where its invalidity is clearly evident, we are led to uphold the statute in question. As bearing upon the matters herein considered, we may cite the following authorities: Cooley, Const. Lim. (6th ed.), pp. 629, 630-1, 703-6, and Id. (7th ed.), pp. 225, 2524; Judson, Taxation, §§ 431, 434, 438-9; Miller, Constitution, 668; 2 Dillon, Mun. Corp. (4th ed.), §§ 762, 817; 8 Cyc. 1049, 1071; Tiedeman, Mun. Corp., §§ 260, 260a; 27 Am. & Eng. Ency. Law (2d ed.), 604; *State v. Ide*, 35 Wash. 576, 77 Pac. 961; *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *Stull v. DeMattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521; *Seabolt v. Northumberland County*, 187 Pa. St. 318, 41 Atl. 22; *Hall v. Judge etc.*, 88 Mich. 438, 50 N. W. 289; *Francis v. A. T. & S. F. R. Co.*, 19 Kan. 303; *Sawyer v. Alton*, 4 Ill. 126; *Dennis v. Simon*, 51 Ohio St. 233, 36 N. E. 832; *Kuntz v. Davidson County*, 6 Lea. (Tenn.) 65; *Faribault v. Miscner*, *supra*; *State v. Womble*, 112 N. C. 862, 17 S. E. 491.

The judgment of the honorable superior court is reversed, and the case remanded for further proceedings not inconsistent herewith.

MOUNT, C. J., DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 6484. Decided November 13, 1906.]

W. B. VAN SICLEN, *Appellant*, v. B. L. MUIR, *Respondent*.¹

COURTS — APPELLATE JURISDICTION — SUPERSEDEAS — INJUNCTION PENDING AN APPEAL. The supreme court has no original jurisdiction to grant injunctive relief pending an appeal upon the application of an appellant, who alleges the commission of acts by the respondent entitling him to relief independent of the appeal, and which are not in violation of appellant's supersedeas bond.

Application filed in the supreme court October 16, 1906, for a writ of injunction to restrain interference with a passageway leading to respondent's premises, pending an appeal from a judgment granting an injunction against the applicant herein. Denied.

Arthur C. Dresbach and *F. A. Gilman*, for appellant.

Vince H. Faben, for respondent.

FULLERTON, J.—This is an original application made to this court for injunctive relief. From the record it appears that the appellant brought an action against the respondent in which he sought to restrain him from interfering with a certain house-boat which the appellant used as a residence. The respondent answered, denying that he had unlawfully interfered with the boat, and pleaded affirmatively that the appellant had anchored his boat in Lake Washington in front of his property, and used his property as a passageway to and from the boat; that the boat when anchored interfered with his littoral and riparian rights, in that it blocked his right of ingress and egress to and from his property to the waters of Lake Washington. He prayed an order enjoining the appellant from using his premises as a passageway, and requiring him to remove his boat from in front of his premises.

¹Reported in 87 Pac. 498.

On the trial the court ruled with the respondent, and granted the injunction requested. The appellant thereupon appealed and gave a supersedeas bond. He now alleges that the respondent has interfered with the passageway leading to his premises, and has annoyed him in other ways, and he asks that this court restrain him from so doing pending the appeal of his action to this court. It is not claimed that the respondent has committed any acts in violation of the supersedeas bond, but it is insisted that he has been guilty of acts in violation of appellant's rights, which entitle him to relief independent of those in litigation on the appeal.

Manifestly the application must be denied. While this court is empowered by the constitution to issue any writ necessary and proper to the complete exercise of its appellate jurisdiction, it has no jurisdiction to issue writs of injunction against a party merely because he is respondent in an action on appeal in this court. To authorize such a writ the acts sought to be enjoined must be something pertaining to the appeal which will render the appeal ineffectual if continued in. No such case as this is made by this application. Here the acts complained of in no way affect the appeal, and the final determination of the appeal will not be affected whether or not the acts are restrained. The appellant has mistaken his remedy. If the acts of the respondent are in violation of the writ of supersedeas, then the relief is to seek the enforcement of that writ. If they are independent acts not within the supersedeas, then the remedy for them must be sought in the court of original jurisdiction.

The application is denied.

MOUNT, C. J., RUDKIN, HADLEY, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

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Statement of Case.

[No. 5338. Decided November 13, 1906.]

HERBERT L. WILLIAMS, *Respondent*, v. SPOKANE FALLS &
NORTHERN RAILWAY COMPANY, *Appellant*.¹

APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY. A brief on appeal sufficiently assigns as error that the verdict was excessive where that was one of the grounds of a motion for a new trial, and the brief assigned as error the overruling of such motion, although the excessiveness of the verdict was not argued in the brief.

SAME—BRIEFS. Argument in a brief against the correctness of admitting testimony or errors tending to excite the jury to passion and prejudice, and to bring in a large verdict, sufficiently points out error assigned as to the excessiveness of the verdict.

APPEAL—REVIEW—DECISION—VERDICTS—REDUCTION. The supreme court may order a new trial, conditional upon the reduction of an excessive verdict, regardless of whether the jury were influenced by passion or prejudice.

APPEAL—DECISION—REASONS FOR REVERSAL. It cannot be objected that a judgment of reversal does not adopt all the contentions of appellant, and the supreme court may deny a request for an absolute reversal, and grant it on condition of refusal to accept a reduction of an excessive verdict.

APPEAL — REVIEW — VERDICTS — REDUCTION — DECISION. Where a judgment is clearly excessive and substantial justice will be done by granting a new trial on condition that a reduction of the judgment is not accepted, the judgment should not be upheld through a technical construction of a rule of court or an unfair construction of an admission by counsel in oral argument.

DUNBAR, J., dissenting.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered May 27, 1904, upon the verdict of a jury for \$83,000 damages for personal injuries. Affirmed on condition of remitting \$13,000.

M. J. Gordon and *C. A. Murray*, for appellant.

Graves & Graves, for respondent.

¹Reported in 87 Pac. 491.

ON RESPONDENT'S PETITION FOR REHEARING.

ROOT, J.—The respondent, by one of his attorneys, has filed a printed petition for a rehearing on the last opinion of the court in this cause. 42 Wash. 597, 84 Pac. 1129. Appellant has moved to strike this petition, upon the grounds: (1) That a petition for rehearing is not permissible after one rehearing has been had; (2) that the language of the petition is discourteous and disrespectful toward the court. Appellant waived the first ground. As to the second, said attorney appeared before this court and explicitly stated that he had not intended to reflect upon, or be discourteous to, the court or any member thereof. In view of this disavowal, and the fact that to strike the petition would be to punish the client, we have decided to deny the motion and to consider the petition upon its merits.

The main contention, and the essence of respondent's argument, is that this court has passed upon a question not properly before it in that we have reduced a verdict and judgment from \$33,000 to \$20,000 when the question of its being excessive was not before us.

The contention has no basis of support either in fact or law. After the verdict was rendered the appellant interposed a motion for a new trial based upon several grounds, three of them being as follows:

"5. Excessive damages, appearing to have been given under the influence of passion and prejudice. 6. Error in the assessment of the amount of recovery, the same being too large and against the weight of the evidence. 7. Insufficiency of the evidence to justify the verdict, and that the verdict is against the law."

It will thus be seen that the question of the excessiveness of the verdict was expressly presented to the trial court. One of these grounds was waived in this court, but two of them were never waived, unless by an implication which we deem unjustifiable. That court denied the motion—thereby ruling

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that the verdict was not excessive, and its action was assigned as error by appellant in its opening brief on appeal in the following language, "The court erred in overruling appellant's motion for a new trial." This was appellant's twelfth assignment of error. It will thus be seen that the question was squarely presented to this court.

In one of his written arguments, upon the question of rehearing, respondent employed the following language: "As counsel state, one ground of defendant's motion for a new trial was that the verdict was excessive. If it was, error was committed by the trial court in denying the motion." This court found that the verdict *was* excessive. Hence, it found that the trial court committed error in denying the motion for a new trial; and as that error was plainly assigned by appellant's opening brief, it became this court's duty to correct the same in the manner it deemed most conducive to the ends of justice. Respondent quotes the rule of court requiring the pointing out of errors. It being admitted by him, as just quoted, that if the verdict was excessive the trial court committed error in denying the motion for a new trial, it follows logically and irresistibly that the error *was* "pointed out" when appellant, in its opening brief, assigned as error the only ruling which the trial court ever made upon the question of excessive verdict—its denial of the motion for a new trial. The rule of court mentioned was intended for the convenience of the court. If we are satisfied with the manner in which it is complied with in a given case, there would seem to be little cause for complaint by any party to the litigation, unless such party be thereby misled, which is not the case here.

The inference to be drawn from respondent's present argument is that the question of excessive verdict was not "presented" or "pointed out", inasmuch as it was not argued in the opening brief. Even if the question were not argued, that would not prevent appellant from having it reviewed.

Neither the statute, nor any rule of court, requires an argument to be made. That is not the essential, legal method by which an error is "pointed out" or an issue "presented." It is the function of the "assignment of error" to "point out" the errors relied on. The only ruling as to the amount of the verdict charged as error against the trial court was its order denying the motion for a new trial, which is "pointed out" in the "assignments of error," and thereby brought to this court's attention. Whether or not it should have been argued, was entirely optional with appellant. The "assignments of error" presented the issue as by the statute and rule of court required. This court then had jurisdiction to deal with it.

As a matter of fact, however, the question of excessive verdict *was* argued by appellant's counsel. In the motion for new trial, certain rulings of the trial court were assigned as a basis for a new trial. Some of these were alleged upon appeal to have been very prejudicial to appellant; and, if they were erroneous, must have had a strong tendency toward inducing the jury to return an excessive verdict. Some of these, and other matters, were argued by appellant in its brief at much length. On page 18 of its opening brief this language appears: "The testimony could serve no other purpose than that of misleading and confusing the jury and establishing a false standard for estimating respondent's damages." It will be seen that this argument bore directly upon the question of damages. At pages 22 and 26 of said brief appellant said: "We submit that it was grossly improper to permit this cross-examination. The plain purpose of it, and doubtless its effect, was to put the witness before the jury as a person who had violated a positive statute, as well as the ethics of his profession, by giving testimony in the case. . . . To say that such a course was not prejudicial would be to ignore human experience and the dictates of common sense." These observations were

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made relative to the cross-examination of a physician who was a witness for appellant. It is plain that if appellant's contention was sound, the error complained of must have tended to arouse passion and prejudice on the part of the jury and to have placed before them improper evidence bearing very materially upon the amount of the verdict.

After devoting fifty pages of its brief to discussing the various errors assigned—most of which bore directly and solely upon matters affecting the amount of the verdict—the appellant said: "For the foregoing reasons the court erred in overruling appellant's motion for a new trial." In other words, appellant submitted this assignment upon the arguments already made. We are cited to no authority requiring anything further. We believe there is none. In a case of this character little argument is necessary on the question of the amount of recovery. The court must examine the evidence. When this is done and the other questions are argued, but little help is gained from extended argument as to the amount. It is entirely different from a case where argument is essential to an understanding of one or more of the errors "pointed out" in assignments of error. In any event, there is no statute or rule making argument a prerequisite to jurisdiction over an issue presented by the assignments of error.

Where the assignments of error merely go to a question of procedure, or bear solely upon a right to *any* recovery whatever, and there is no separate assignment as to the amount of recovery, respondent's contention might possibly be upheld. But this is not such a case. Here the *principal* question was as to the amount of the verdict. The matters complained of and covered by the 2d, 3d, 4th, and 12th assignments—and there were several matters under each—bore upon the question of the amount, as well as upon other questions, and to say that the entire question of amount was waived because one ground of the motion for a new trial—it contained

several—was not contended for, would be to announce a doctrine both void of reason and unsupported by authority. Even if the matters in any one assignment of error did not in themselves justify a new trial, yet, taken with those involved in all of the other assignments bearing upon the size of the verdict, they might very properly, and in this case did, furnish good reason to believe the verdict excessive and to justify its modification. Counsel says this court has refused in certain cases to pass upon questions not plainly pointed out; but he has not cited a case of such refusal where the record and facts were like those of this case, and for the very good reason that there is none.

If the 12th assignment of error had not been made, the question of the amount of the verdict was properly before the court under other assignments—especially two, three and four, which were directed against the trial court's action in overruling objections made to numerous questions asked witnesses by respondent's counsel. If the trial court was in error as to any of these matters, it was an error well calculated to induce the jury to bring in a large verdict. Most of the questions involved bore upon the nature and extent of respondent's injuries and the conduct of a physician and others toward him after the injury. Many of the things covered by these three assignments were matters that undoubtedly inflamed, and otherwise improperly influenced the jury and contributed to the large verdict. If this court believed these three assignments, or any of them, to be well taken, and to constitute prejudicial error, it had jurisdiction to reverse the case. Respondent does not deny this. If the court, because of these alleged errors, had the power to reverse the judgment of the trial court, it, of course, had the power to modify that judgment. The greater includes the less. A reversal would set aside the entire judgment; a modification sets aside only part of it. The statute [Bal. Code, § 6521 (P. C. § 1069)], says that "the supreme court

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may affirm, reverse or *modify* any such judgment or order appealed from, as to any or all the parties, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." It will thus be seen that if this court had jurisdiction to reverse the judgment, it had likewise jurisdiction to modify it. If it had the power to grant a new trial absolutely, it had the power to grant it conditionally. The same assignments, the same facts, and the same statutes that give this court jurisdiction to reverse a judgment, give it jurisdiction to modify it or to direct a new trial if the successful party does not remit a portion of his judgment.

While this court could arbitrarily have reduced the amount of the judgment and terminated the litigation, it has not done so. It remands the case with directions for a new trial unless respondent consents to the reduction. This court has left the matter optional with respondent as to whether he shall accept the \$20,000. If he feels that his injuries merit a larger amount, he is given another chance. If he is so badly injured that \$20,000 will not adequately compensate him, perhaps he may be able to show it on another trial. Possibly he may be able to produce better evidence than he had before. He is not compelled to accept the \$20,000. He is at liberty to go before another jury and if he can show that he is entitled to a greater sum it will doubtless be awarded him.

Respondent calls attention to the fact that this court stated in its first opinion that no question was made as to the verdict being excessive. True; and we deemed that a misconception which justified a rehearing. The purpose of a petition for a rehearing is to call the court's attention to what the petitioner believes to have been an error in its former opinion. When the court believes there is a probability that it has made a mistake, it is its duty to grant the rehearing; and, if then convinced of its error, to rectify the same. That is exactly what we have done. Appellant filed its petition

for rehearing. Respondent was requested to answer, which he did with an elaborate brief, and a rehearing was ordered. Respondent filed another elaborate brief, and the present counsel reargued the matter orally, besides submitting additional typewritten observations. After a consideration of all these and appellant's briefs, and a careful and thorough examination of the evidence, the court rendered the opinion now complained of.

Notwithstanding his three printed briefs and his one typewritten, and two oral arguments, counsel for respondent urges that his client has had no opportunity to be heard upon the question of the amount of the verdict. In his petition and argument now before us he says: "It was assumed in plaintiff's brief (naturally, I think) that the amount of the verdict was not questioned." Let us see how this statement comports with those in his former briefs. In his brief filed in answer to appellant's opening brief, some fifteen pages are devoted to the character and extent of respondent's injuries and to matters which appellant contended were calculated to inflame or improperly influence the jury. The character and extent of respondent's injuries had no bearing upon any question involved except the amount of damages. Then why did respondent's counsel discuss these matters if the only issue they affected was not in the case. Able attorneys do not usually waste fifteen pages of printed brief on a subject-matter not before the court. In their first brief, at page 42, respondent's attorneys use this language: "A verdict for \$50,000, the whole amount demanded, would have been amply sustained by the evidence. Surely defendant has no right to complain of the \$33,000 verdict which was rendered." Does this sound as though counsel believed the question of the amount was not involved? When they say, as just quoted, that appellant "has no right to complain of the \$33,000 verdict," does that look as if they had no idea that appellant *was* complaining? On page 40 of said brief,

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after speaking of the amount of the verdict, respondent's counsel say: "If this be true, defendant cannot complain of error relating to fixing the *measure of damages*." In the light of these statements, how can it be said they did not know that the question of the amount of recovery was involved and made no argument touching it? On page 19 of its reply brief, appellant uses this language: ". . . and had they (the jury) believed him, manifestly this monstrous verdict of \$33,000 could never have been rendered." Can anyone read this and believe that appellant was making no complaint about the amount of the verdict? On page 29 of said brief appellant says: "We submit that the errors complained of were each and all prejudicial." This does not read as if appellant was waiving any of them.

In its petition for rehearing at page 2, appellant assigned its first ground in the following language: "1. Mistake on the part of the court in assuming, at the top of page 5 of the opinion, 'That the amount of judgment is not called in question.'" Does this not show plainly that appellant *was* calling in question the amount of the judgment? On page 10 of the same brief, appellant says: "How can it be told how much was added to the verdict because of the shameful spectacle improperly permitted in the cross-examination of Dr. Potter?" A similar remark follows as to the matters covered by another assignment.

In preparing and presenting their numerous briefs and arguments, respondent's counsel knew of the matter which we have just quoted from appellant's petition for rehearing—knew that appellant was urging that the amount of the verdict and judgment was excessive and was in question. Knowing this, they had the privilege and right to argue the matter. If they did not wish to do so, the fault (if any) is not with the court. Their briefs, however, show that the question was argued. To be sure, they filed a typewritten protest against appellant's raising the question in one of

its briefs on rehearing, and they make the statement, directly and indirectly in other of their briefs, that the question of amount is not before the court; but it is impossible to read the many pages of their briefs bearing upon the question of amount, and urging the right of this court to reduce excessive judgments, without seeing that the question was treated as being involved and that the court was being shown that it had the power to reduce the amount rather than grant a reversal and a new trial unconditionally.

Respondent's counsel appear to think that appellant waived any question of excessive verdict because its attorney stated that he would not urge it upon the ground of "passion or prejudice," but insisted upon a reversal by reason of the errors alleged in the other assignments. As these latter covered the other, it was practically a "distinction without a difference," the means by which any passion or prejudice or other wrongful influence was produced being immaterial. It could make little difference to appellant whether the verdict was excessive from one cause or another, the material question being whether, as a matter of fact, it *was* excessive. In his petition for rehearing, appellant's counsel expressly and emphatically urges that the judgment was excessive. But respondent's counsel insists that we had no right or power to reduce the judgment and that our action has overturned all precedent. We could readily justify our procedure by citation to many authorities, but it is necessary only to refer to the argument of respondent's counsel himself and the authorities he cites.

At page 3 of his brief, in answer to appellant's petition for rehearing, he uses this language: "This court, in common with the majority of the courts of the United States, has always conceded to the courts the power to reduce verdicts when they are deemed excessive, *even though they are not charged to have been induced by passion or prejudice.*" And in support of this statement he cites, with others, the

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following cases: *Arkansas Val. Land etc. Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, where the verdict was reduced from \$39,958.33 to \$17,125; *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334, judgment reduced from \$7,500 to \$5,000; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, reduction from \$40,000 to \$25,000; *McDannald v. Washington etc. R. Co.*, 31 Wash. 585, 72 Pac. 481, reduced from \$10,000 to \$4,000; *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808, reduction from \$9,000 to \$6,000; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70, 74 Pac. 1064, reduced from \$12,500 to \$8,000; *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978, \$8,040 to \$5,000; *Halverson v. Seattle Electric Co.*, 35 Wash. 600, 77 Pac. 1059, \$20,000 to \$10,000.

He could have cited many more from this and other appellate courts. In the same brief at page 11 he used this language: ". . . the decisions of this court *require the courts* to weigh the evidence and pass upon the question *whether the verdict returned is excessive*, and, if in their opinion it is, *to require its reduction*." This is exactly what we have done. At page 13 of the same brief, he says: "But this court has said so repeatedly that discretion lies with the trial or appellate court to reduce a verdict deemed excessive, and that *not because of passion or prejudice but because of its view of the evidence*," etc. At page forty-two of the same brief, this language is used: "Unless this court has for years been usurping an authority it did not possess, . . . an appeal to it to reduce an excessive verdict, *however induced*, would have been effective."

These portions of his brief, and many others that might be quoted, emphatically uphold the very procedure this court has followed in this case. Then again in his brief on the first rehearing, at page thirteen, he says: "Had the error of which defendant complains not been committed, the jury might, and should have awarded plaintiff \$41,020," etc. This

would seem to be an admission that an error *was* committed of which defendant (appellant) *did* complain and that it was an error *affecting the amount of recovery*. In the same brief, at page 55, he says: "Year in and year out, during the whole period of its existence, has this court, upon the challenge of the defendant, reviewed the evidence in personal injury cases with respect to the amount of damages allowed, and in many, very many cases, *in the exercise of its discretion to grant a new trial*, required the remission of a portion of the verdict as a condition to denying a new trial." And at page fifty-six of the same brief, he says: ". . . In view of the many cases in which this court has required a remission from the verdict as a condition to denying a new trial, and in which *neither in the appellant's brief nor in the opinion of the court*, is there any suggestion that the verdict was induced by passion or prejudice, it is idle to contend that the power of the courts to require a remission from the verdict is limited to cases where the verdict appears to have been induced by passion or prejudice." He was then resisting appellant's contention for an absolute reversal and new trial.

It is difficult to read said brief, especially from pages 54 to 58, and escape the conclusion that respondent's attorneys were inviting a reduction instead of an absolute reversal in case an affirmance could not be had—not expressly, of course, but by necessary implication arising from the language used. The correctness of these statements quoted from the briefs of respondent cannot be questioned and they are as applicable now as when written. They show that juries cannot be treated as infallible and that the court may and should correct their errors.

If passion or prejudice on the part of the jury is shown, the court may reverse the judgment or reduce it even if there is no other error in the case. On the other hand, if no passion or prejudice is shown, but errors as to admission or exclusion of evidence or as to instructions or as to any other

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matter appear, or if matters, permissible for certain purposes, are shown which this court believes had the effect of unduly augmenting the amount of the verdict, this court may give relief to the party injured by said matters; and that relief may be by an absolute reversal, a modification of the judgment or an order for a new trial conditioned upon the successful party declining to remit such a portion as may be indicated. This authority is given by the statute and, as above admitted by respondent, has always been observed in the practice in this court. No valid reason is suggested why our action in following the usual practice was not justifiable in this case.

Respondent's counsel insists that appellant's counsel stated upon the first oral argument that "No question is made, as to the amount of the verdict rendered." Appellant's counsel emphatically denies this and states that what he did say was that he would not urge that the verdict was excessive *by reason of passion or prejudice of the jury*. Appellant's version being in accord with its position as maintained in all of his briefs, we are constrained to believe that respondent's counsel may have misunderstood or failed to accurately remember the statement of opposing counsel. In fact, in his brief in answer to appellant's petition for rehearing, respondent's counsel, after using the expression above quoted, employs this language: "The writer, at this length of time, would not be sure those were the identical words employed," thus admitting that he does not remember accurately although he avers that it was substantially as above quoted. Listening to an oral argument, it is easy to miss a portion of a statement and it is not at all uncommon to forget, or be mistaken as to, a statement made a year previously. Appellant's counsel in all of his briefs was contending that errors were made by which improper cross-examination of witnesses was permitted in the presence of the jury and improper evidence submitted to them, all of which was calculated to, and

did, make the jury bring in the large verdict. That an appellant on an appeal from such a verdict should make no complaint about the size thereof, would be a most remarkable omission. If it had no complaint to make of the amount of the verdict, why did it appeal? If the judgment had been nominal or for a small sum, it is inconceivable that any appeal would have been taken.

It is suggested that our decision is not in accord with some of the contentions of appellant's counsel. Because a case is decided in favor of a party, it does not follow that the court must accept the views of the attorney for such party upon all matters discussed. Appellant's counsel urged that errors had been committed by the trial court and that his client was entitled to an absolute reversal on account thereof. He did not believe that adequate relief could be accorded by anything less. We became satisfied that an injustice had been done his client; but we believed that he was not entitled to all he asked. Therefore we declined to reverse the case absolutely, but gave respondent his choice of reducing his judgment or taking a new trial. Because we required \$13,000 to be remitted or a new trial to be granted, instead of granting a new trial absolutely, which would have wiped out the entire \$33,000, we cannot see that we are inconsistent or that respondent's counsel has any cause of complaint.

A court's decision in a given case should be construed in the light of the issues and the contentions therein. In passing upon assignments of error 2, 3 and 4, we did not announce that we found them without merit; but we held in effect that appellant's contention that they justified an absolute reversal could not be sustained. We believed there were matters covered by those assignments that well merited appellant's complaint; but we believed they went to the amount of the verdict and that the wrong they accomplished could be adequately remedied by a reduction of the judgment and that an unconditional reversal was not necessary. For instance, the evi-

dence of respondent as to visits of the appellant's claim agent, we held to be admissible for one purpose *only*. But while we held it admissible for that purpose, it unavoidably served another purpose, and we could not shut our eyes to the fact that it was well calculated to impel the jury toward an excessive verdict. Then as to the cross-examination of Dr. Potter, we believed there were conditions that prevented this, in itself, from being reversible error; yet no one could possibly doubt its potent influence upon the amount of the verdict. If any technical objection is urged to the wording of the opinion, a sufficient answer is that we were aiming at substantial justice as between these parties, being anxious to do what we believed to be just and right rather than being concerned about the nonessentials appertaining to technicalities and form.

The record in this case clearly shows that nothing short of an unreasonable, unjustifiable, technical construction of the statute and rules of court could sustain the contention made by respondent in this petition for rehearing. Turning from technicalities to considerations of justice and right, there is nothing to sustain him. Respondent met with a serious injury and his misfortune must appeal to anyone with a human heart. But courts must be controlled by the facts and law, and not by sympathy or prejudice. Many persons suffering injuries as great as those of respondent have been awarded judgments much less in amount than \$20,000. Counsel has not pointed out an instance where any person with injuries no greater than those of respondent ever recovered \$20,000. We know of no such instance.

None of the judges of this court dissented from the proposition that the verdict was excessive. Had it been an original proposition, the court would have placed the amount less than \$20,000; but in order to sustain the verdict of the jury as far as we conscientiously could, it was decided to allow \$20,000. We do not believe any fair-minded, disinterested person can read the evidence without reaching the conclusion

that \$20,000 is a *very* liberal compensation for respondent's injuries. In the face of this record showing a grossly excessive verdict—in the face of our conviction that the amount of the judgment is unwarranted and wrong, we are urged to uphold the judgment. We are vigorously criticised for not so doing. We are requested to adjudicate the court powerless to rectify a gross injustice clearly shown by the record. As a justification for upholding this palpable wrong, we are urged to endorse a strained, highly technical interpretation of a rule of court, and an unfair and unreasonable construction of an oral concession or waiver of appellant's counsel. We decline to avoid our plain duty upon any such pretext. Courts will not be astute to invoke or apply technical constructions or to indulge in fanciful refinements for the purpose of thwarting the demands of justice and right. Our code, and the spirit pervading our entire jurisprudence, require that this and all courts in this state should endeavor to mete out substantial justice. Had we been controlled by strict technical considerations, we would doubtless have reversed the case and directed a new trial unconditionally. But we believed there could be virtually no question upon a retrial except that of the amount of the recovery. To obviate the trouble, expense and delay of another trial, we deemed it to be in the interest of substantial justice to give respondent the option of a judgment for \$20,000 or of submitting to a new trial.

Under the law and facts of this case, if anyone has cause for dissatisfaction, it is the appellant. But everything considered, we are satisfied that substantial justice has been done as between these parties. Each side has been heard by four briefs and two oral arguments. The evidence and entire record has been examined and considered most conscientiously and the court has endeavored to be fair and just. Believing that respondent's rights have been in no manner prejudiced, his petition for a rehearing is denied.

MOUNT, C. J., HADLEY, and CROW, JJ., concur.

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Dissenting Opinion Per DUNBAR, J.

DUNBAR, J. (dissenting)—I dissent. I should not feel it incumbent upon me to further discuss this case did I not feel that the court has misconstrued the position of counsel for respondent in the foregoing opinion. I have believed, and am constrained to believe yet, that this court has not heretofore, and does not now, understand the position taken by counsel for the respondent. It is true, the counsel asserted that this court, in common with the majority of courts, had conceded to courts the power to reduce verdicts when they were deemed excessive, even though it was not claimed that the verdict had been induced by passion or prejudice; and cited many cases to sustain that position. But, of course, in all such cases it was assumed that an assignment of error had been made that the judgment *was* excessive; and respondent's argument was made to show that such an assignment *could* be made in answer to the claim of the appellant that he *could not* assign "excessive verdict" because he did not claim that it was induced by passion or prejudice on the part of the jury, but was by reason of alleged errors made by the court.

The majority, in order to sustain the conclusion announced, cite copiously from appellant's brief, pages 18, 22 and 26, where it is insisted that the court erred in relation to the admission of testimony, which errors were properly assigned and discussed; and then says:

"It is plain that, if appellant's contention was sound, the error complained of must have tended to arouse passion and prejudice on the part of the jury and to have placed before them improper evidence bearing very materially upon the amount of the verdict."

It is difficult to see what relevancy this statement has, in the face of the opinion rendered by the majority on appellant's petition for rehearing, where it was held that the court did not err in the particulars complained of. So that it must logically follow that, if there was no passion or prejudice on the part of the jury—which is admitted—and no

error committed by the court which prevented a fair trial or tended in any way to arouse passion or prejudice—which is decided—the judgment should have been affirmed. The court, to sustain its conclusion in denying respondent's petition, says:

"If passion or prejudice on the part of the jury is shown, the court may reverse the judgment or reduce it even if there is no other error in the case. On the other hand, if no passion or prejudice is shown, but errors as to admission or exclusion of evidence or as to instructions or as to any other matter, are shown which this court believes had the effect of augmenting the amount of the verdict, this court may give relief to the party injured by said errors, and that relief may be by an absolute reversal, a modification of the judgment or an order for a new trial conditioned upon the successful party declining to remit such a portion as may be indicated."

But no passion or prejudice on the part of the jury was shown, which fact has all along been conceded by the appellant, and which admission he pleads as an excuse for not making the assignment of excessive verdict. On the other hand, it has been decided by this court that there were no errors as to the admission or exclusion of evidence, or as to instructions, or as to any other matter which this court believed had the effect of augmenting the amount of the verdict. Then, what is the basis of the relief which the court has given? The palpable fact to my mind is, and that fact cannot be talked out of existence, that the present judgment of the court, as indicated by the majority opinion, is absolutely inconsistent with the judgment rendered and opinion expressed on the appellant's petition for rehearing; and every argument which is made in support of the present opinion is an argument against the former opinion.

There is an attempted distinction made between assignments of error in regard to excessive verdicts and other assignments, but I will pass that by simply saying that I had always supposed that any and all contentions which might

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result in the reversal or modification of a judgment, in whole or in part, would fall within the same rule, and that a respondent would be equally entitled to defend his judgment, or any part of it, by argument made to this court, no matter what the assigned cause for its reversal was.

In defense of the position now announced by the court, that this court will determine questions which are not assigned, the majority say that no cases have been decided where this or other courts have refused to take such cognizance which are exactly like the case at bar; and all the cases cited by the respondent and in the dissenting opinion on the appellant's petition for rehearing in this case are thus brushed aside. No two cases present exactly the same state of facts, but multitudes of cases do embody the same principles; and this principle has been so often announced by this court that it would be idle to reproduce the citations here.

But if any argument were necessary to show the fallacy of the position contended for by the majority and the absurd results which will follow, it is furnished by the majority opinion where it sets forth the conflicting contentions of respective counsel as to what was admitted in oral argument concerning the justice of the amount of the verdict. If there had been an argument made in the brief, as the law and the rules of this court plainly provide, the issues would have been presented and understood without resorting to a discussion and analysis of conflicting oral statements by respective counsel and of affidavits offered to show what the issues really were.

In conclusion, if the doctrine announced by the majority opinion prevails, viz., that no further assignment of error need be made in the brief than that the court erred in refusing to grant a motion for a new trial, and that no argument is required, then all that it is necessary for an appellant to do is to make the one assignment, that the court erred in refusing to grant a new trial; and that brings before this court

all the questions assigned upon the motion for a new trial, even though there be a hundred or more, without any notice whatever to opposite counsel as to what particular errors are relied upon, or what particular ones have been abandoned, since the motion for a new trial was made. For it must be true that, if one of the grounds of motion for a new trial can be reviewed upon appeal without an assignment or argument, they can all be reviewed—a practice which, if it prevails, will lead to confusion and injustice.

[No. 6305. Decided November 14, 1906.]

THOMAS H. BAIN, *Respondent*, v. J. C. THOMS *et al.*,
Appellants.¹

APPEARANCE—SPECIAL OR GENERAL — PROCESS — SERVICE — WAIVER. A special appearance to object to the jurisdiction for want of service of process is rendered general by asking for the dismissal of the action for reasons relating to the merits, and waives the question of due service.

APPEAL—DECISION—ADMISSION OF PARTIES—JUDGMENT—VACATION. The supreme court may, on remanding a case, direct that a default judgment be vacated where respondents are willing that the case be opened and tried on its merits.

Appeal from an order of the superior court for King county, Morris, J., entered February 17, 1906, denying defendants' motion to set aside a judgment. Reversed.

George E. Knapp and *John B. Shorett*, for appellants.
Everett Smith and *Thos. H. Bain*, for respondent.

Root, J.—Respondent began this action to recover certain moneys alleged to be withheld by appellant J. C. Thoms. Service upon defendants was made, or attempted to be made, by leaving copies of the summons and complaint at the resi-

¹Reported in 87 Pac. 504.

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Opinion Per Root, J.

dence of one Mrs. Treisch, in Seattle, where defendants were alleged to have had their usual place of abode. Neither of defendants appeared, and nearly ninety days thereafter default was entered as to each, and judgment thereupon. Subsequently defendants, by a motion reciting that they were "appearing specially herein for the purposes of questioning the jurisdiction of this court, and for no other purpose," moved that

" . . . said judgment in the above entitled action be set aside, that said action be dismissed, and that defendants have judgment against plaintiff for their costs and disbursements herein, and for such other and further relief as to the court may seem just."

This motion was based upon the record and files, and upon affidavits of the defendants and others, the affidavits setting forth that they did not reside at the home of Mrs. Triesch, and that it was not their usual place of abode; that they had never been served; that plaintiff had no valid claim against them or either of them; that they had a good and sufficient defense to such action, and that plaintiff was indebted to them; and J. C. Thoms alleging that he had no notice of the commencement of said action until he ascertained the same from a clipping from a paper. These affidavits were met by affidavits filed on behalf of respondent. The motion to set aside the judgment was denied. From the order of denial, this appeal is taken.

Appellants urge that the service attempted to be made was insufficient to give the court jurisdiction over them. For reasons hereinafter stated, we deem it unnecessary to pass upon this question.

In the motion wherein appellants assumed to appear specially they did not ask to have the service of summons and complaint quashed, nor did they confine themselves to a prayer for the setting aside of the default and judgment, but they prayed that the judgment be set aside and that the action be dismissed, and that they have judgment for costs

and disbursements, and such other relief as to the court might seem just; and they based their motion upon the records, files and certain affidavits, some of the latter setting forth facts going to the merits of the controversy. We think their appearance must be construed to be general. In the case of *Teater v. King*, 35 Wash. 138, 76 Pac. 688, this court said:

"The appearance of appellant was in form special, for the purpose of objecting to the court's jurisdiction over his person, but in the body of his motion he invoked the jurisdiction of the court below on the merits, when he asked for a dismissal."

In the case of *Burdette v. Corgan*, 26 Kan. 102, the supreme court of Kansas, speaking through Justice Brewer, said this:

". . . we remark that this appearance by the motion, though called special, was in fact a general appearance, and by it this defendant appeared so far as she could appear. The motion challenged the judgment not merely on jurisdictional but also on nonjurisdictional grounds, and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion."

If we should hold the service in this case to be insufficient it would necessitate the remanding of the case with instructions to the trial court to treat the appellants as having waived service, and as being before the court. *French v. Ajax Oil etc. Co.*, ante p. 305, 87 Pac. 359. They would then be required to interpose whatever defense they desired. But the respondent states, in this court, that he has been willing at all times that appellants should come into the case and make their defense upon the merits, and that he is at this time willing that they should be permitted so to do. In view of this offer on his part, we remand the case to the superior court with directions to set aside the judgment if the appellants interpose a meritorious answer within twenty days from the date of the filing of the remittitur, and for such further

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proceedings as may be had in the ordinary course. If no such answer is filed within said time, the judgment shall stand as affirmed. Costs to abide the final result.

DUNBAR, CROW, and HADLEY, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6314. Decided November 14, 1906.]

W. P. FULLER & COMPANY, *Appellant*, v. JOHN E. RYAN
et al., *Respondents*.¹

MECHANICS' LIENS — BUILDING MATERIALS — FORECLOSURE — STATUTES—CONSTRUCTION. Under Bal. Code, § 5900, giving a lien for "furnishing materials to be used in the construction" of any building, no lien can be established unless it is made to appear that the materials were actually used or delivered on the premises for use in the construction of the building.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 11, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

Gray & Stern, for appellant.

H. R. Clise, John B. Hart, E. P. Whiting, and *John E. Ryan*, for respondents.

Root, J.—This was an action commenced by appellant, a wholesale paint firm of Seattle, to foreclose a lien for painting materials furnished for use on a building erected by respondents Ryan and wife. Findings of fact and conclusions of law were entered favorable to defendants. From a judgment and decree thereupon, this appeal is prosecuted.

¹Reported in 87 Pac. 485.

Exceptions are taken to several findings of fact, and the making thereof is assigned as error. We think the findings complained of are sustained by the evidence; at least, all those that are material to a decision of the case, in the light of the conclusion which we have come to upon the paramount legal proposition involved. It was urged by appellant that the principal error of the trial court was its holding to the effect that a materialman's lien could not be established where it did not appear that the materials were actually used in constructing the building, or delivered on the premises for such use. Appellant, through its counsel, expressed itself as willing to base its rights to a reversal of the decree on this proposition. We think the holding of the trial court upon this question must be upheld. Pierce's Code, § 6102 (Bal. Code, § 5900), provides that:

"Every person performing labor upon, or furnishing materials to be used in the construction . . . of any building . . . has a lien upon the same for the labor performed or materials furnished . . ."

Under a similar statute the supreme court of Illinois, in the case of *Hunter v. Blanchard*, 18 Ill. 318, 68 Am. Dec. 547, held that not only was a contract for the materials essential, but that they must be actually used in the building, in order to afford a basis for a lien. The statute involved in that case was as follows:

"Any person who shall by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting any building or the appurtenance of any building on any land or town lot, shall have a lien," etc.

If the materials were not used in the building, nor taken to the premises, we do not think it could be said that they were purchased to be used in such building, within the meaning of the statute. The reason for allowing a lien to secure the purchase price of building material would seem to be absent where such material was neither used in the building

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nor taken to the premises for that purpose; and it would be difficult to see why the vendor of such material would have any better right to a lien than would the seller of any other species of personal property. Doubtless, the actuating thought of the legislature was that the materialman should retain a purchase-price lien upon the thing itself; and this could be accomplished only by allowing a lien upon the building and the premises into which, or upon which, said material should become builded or delivered. To hold the right of lien further extended could only be done under a statute clearly evidencing such an intention on the part of the legislature. We deem our statute incapable of such a construction. *Houghton v. Blake*, 5 Cal. 240; *Eisenbeis v. Wakeman*, 3 Wash. 584, 28 Pac. 923; *Silvester v. Coe Quartz Mine Co.*, 80 Cal. 510, 22 Pac. 217; *Bewick v. Muir*, 83 Cal. 373, 23 Pac. 390; *Hill v. Bowers*, 45 Kan. 592, 26 Pac. 13; *Chapin v. Persse*, 30 Conn. 461, 79 Am. Dec. 263.

In view of what we have said, it becomes unnecessary to pass upon the contention of respondents that the notice of lien was fatally defective.

The judgment of the superior court is affirmed.

MOUNT, C. J., DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 6350. Decided November 14, 1906.]

WILLIAM J. THOMSON, *Appellant* v. UNITED STATES
FIDELITY & GUARANTY COMPANY, *Respondent*.¹

INSURANCE—CHANGE OF RISK—PROVISIONS OF POLICY—CONSTRUCTION—LEASE UNDER BURGLARY INSURANCE. A policy of insurance against loss by burglary while the premises are actually occupied by the assured, providing that the same shall be void if the risks are changed without the written consent of the company, is not avoided by reason of the fact that the owner leased the premises without such written consent, where a further clause in the policy declares that it shall be void in case the premises are left unoccupied for a period exceeding six months without the written consent of the company, in view of the rule that inconsistent clauses shall be construed most strongly in favor of the assured.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 23, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to recover on an insurance policy. Reversed.

J. W. Rayburn and Wm. H. Brinker, for appellant.

Walter S. Fulton, for respondent.

Root, J.—This was an action to recover on an insurance policy, issued by respondent to appellant, against loss of property by theft, larceny or burglary. From a judgment in favor of defendant, this appeal is prosecuted. On the 18th of December, 1904, the policy sued upon was issued to appellant, covering, for the period of one year, various items of personal property contained in appellant's home in Seattle. On or about the 1st day of May, 1905, part of the property thus insured was stolen from said house. Some four months prior to the time of the theft, the appellant, without the written or other consent of defendant, and without its knowledge, leased the house to tenants who occupied it

¹Reported in 87 Pac. 486.

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at the time of the theft, said insured property being stored in the attic of the building. Said policy contained the following provisions:

"For direct loss by burglary, theft or larceny of any of the property described in the schedule hereinafter given and constituted to be insured hereunder occasioned by its felonious abstraction from the interior of the house, building, apartments, room or rooms, actually occupied by assured, and described in said schedule, and hereinafter called the premises, by any domestic, servant or employee of the assured, or by any person or persons, except the assured, and for direct loss by damage to said property and to the said premises caused by burglars and thieves.

"This policy shall be void if the conditions or circumstances of the risk are changed without the written consent of the company, or if the assured attempts in any way to defraud the company, or if the policy is assigned without the written consent of the company."

Respondent contends, and the trial court upheld the contention, that the leasing of the premises by the assured without respondent's consent constituted a change in the "conditions and circumstances" of the risk which rendered the policy void under and by virtue of the provisions just quoted. Appellant meets this contention by a reliance upon the following provision in said policy:

"If the premises are left without an occupant for a period exceeding six consecutive months, unless a written permit for such nonoccupancy, signed by an executive officer of the company, is endorsed upon or attached to the policy,"

the defendant should not be liable for loss or damage. It will be observed that this provision is absolutely inconsistent with the others above quoted. Those portions implied that the property was to be insured while in a building *actually occupied by assured*, and expressly stated that a change in "conditions or circumstances of the risk" should render the policy void. But the provision relied upon by appellant plainly contemplates that the assured might change the conditions

and circumstances by leaving the premises without an occupant for a period not exceeding six months. If the assured was authorized to leave the building for that period without any occupant, he certainly would be justified in leaving it with occupants, unless the latter were people of a character endangering the risk. Nothing of this kind appears in the case, and we cannot presume that the tenants were lawless or unreliable people. As the sections quoted are irreconcilable, the question is presented as to which shall control.

Adjudicated cases upon questions of burglary insurance appear to be scarce, in so far as they throw any light upon the questions here involved; but it would seem that policies of this character are analogous to those of life, accident, and fire insurance. As to such policies, the rule is well established that, where by reason of ambiguity, inconsistency and uncertainty, either of two divergent constructions might find support, a policy will be given that interpretation which is the more favorable to the assured. As the instrument is prepared by the insurance company, it is presumed that appropriate language has been employed to safeguard its interests; and the rule is particularly applicable in determining the effect to be given clauses and provisions which are more or less obscure, and which are claimed to limit the company's obligations or reserve exceptions to its general liability. The section of the policy, relied upon by appellant, authorizing him to leave the premises for a period not exceeding six months without the "written permit," being at variance with the provisions as to the house being "actually occupied by assured," and as to the change in "conditions or circumstances . . . without the written consent," and these latter provisions being intended to limit the liability of the company, we must hold, under the accepted rule applicable to insurance contracts, that the appellant herein had the right to leave the premises for a period not exceeding six consecutive months without the consent of the company;

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and as the condition of the premises with tenants, not shown to be criminal or suspicious characters, would of necessity afford more protection to the insured property than if the house were left entirely without occupants, we think no violation of the policy on the part of appellant has been shown.

In the case of *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 88 Pac. 113, this court said:

"It is the established and universal law that insurance policies are to be construed in favor of the insured, and most strongly against insurance companies. This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life."

In the case of *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267, the supreme court of Alabama employed the following language:

"Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary especially in modern times to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy."

See, also, *Rumsey v. Phoenix Ins. Co.*, 1 Fed. 396; *Crane v. City Ins. Co.*, 3 Fed. 558; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81; *Olson v. St. Paul Ins. Co.*, 39 Minn. 432; *Boon v. Aetna Ins. Co.*, 40 Conn. 575; *Moore v. Phoenix Ins. Co.* [64 N. H. 140], 10 Am. St. 390 and note; 1 Cooley, *Brief on Ins.*, pp. 632-4; 2 Id., pp. 1723, 1743-6.

The judgment of the honorable superior court is reversed, and the cause remanded with directions to enter judgment in favor of appellant for the value of the goods as found by the trial court, together with legal interest and costs.

DUNBAR, CROW, FULLERTON, and HADLEY, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6324. Decided November 14, 1906.]

MORAN BROS. COMPANY, *Respondent*, v. CHARLES WATSON,
Appellant.¹

PARTNERSHIP—BILLS AND NOTES—EXECUTION—EVIDENCE—SUFFICIENCY. In an action upon a promissory note given by a partnership in aid of the construction of a battleship, in which the testimony of the two partners conflicts as to the authority of one of them to execute the note, the burden of proof upon the plaintiff is sustained where it appears that the construction company was one of the firm's best customers, that the objecting partner was notified that a note had been executed therefor by the other in his absence, and made no objection, and the partner signing the note had no interest in making the subscription individually.

SAME—BOOKS OF ACCOUNT—EVIDENCE—ADMISSIBILITY. In such a case, it is not error to exclude evidence of the copartnership books of account, it being immaterial whether the note was entered thereon in case it had been ratified.

SAME—JUDGMENT—ENTRY AGAINST ONE MEMBER OF FIRM—SERVICE OF PROCESS. One partner cannot complain that judgment for a partnership debt was entered against him alone, where he was the only partner served, knew that his copartner had not appeared, and that judgment would be taken against him alone, and made no motion for a new trial.

FULLERTON, J., dissenting.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 4, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a promissory note. Affirmed.

Jerold Landon Finch, for appellant.

James Kiefer, for respondent.

CROW, J.—The plaintiff, Moran Bros. Company, a corporation, instituted this action on December 7, 1904, against the defendants, Charles Watson and Frank Hanford, copart-

¹Reported in 87 Pac. 508.

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ners as Watson, Hanford & Company, upon a promissory note in words and figures as follows:

"\$250.00 Seattle, Washington, January 16th, 1901.

"If Moran Bros. Company, a corporation, shall bid for and obtain from the United States government a contract for the construction of one of the battleships, construction of which is now under consideration of the government, I promise, for value received, to pay to the order of said corporation, at the Banking House of Puget Sound National Bank in the city of Seattle, on the day upon which said battleship shall be launched into the waters of Puget Sound, the sum of two hundred and fifty dollars in gold coin of the United States, of the present standard of weight and fineness, with interest thereon in like gold coin after maturity until paid at the rate of eight (8) per cent per annum. And, if suit shall be commenced for the recovery of any amount due upon this note, I agree to pay a reasonable attorney's fee in such suit, the amount thereof to be determined by the court in such action.

"Watson, Hanford & Co."

The complaint alleged that the plaintiff had obtained a contract for the construction of a battleship which, at the date of the note, was under consideration by the United States government; that it entered upon the work, and that the battleship was, on October 7, 1904, launched in the waters of Puget Sound. The defendant Charles Watson answering separately, denied the execution of the note by the partnership, and affirmatively alleged that the copartnership of Watson, Hanford & Company was organized for the sole purpose of doing a general insurance business; that during its existence its only business was that of general insurance; that never at any time was its business that of constructing battleships or contributing funds to others therefor; that the promissory note was executed by Frank Hanford, without authority to bind the copartnership, and without the knowledge or consent of the defendant Watson. The trial court made findings of fact in accordance with the allegations of the complaint, and refused findings requested by

the defendant Watson. No service having been made upon the defendant Hanford, judgment was entered against the defendant Watson, and he has appealed to this court.

The principal contention of the appellant is that the trial court erred in its findings of fact. The partnership of Watson, Hanford & Company was formed for the general purpose of doing an insurance business, and for no other purpose. The evidence shows, however, that such partnership had entire control of the casualty insurance of the respondent, and also wrote much of its fire insurance, the respondent being one of its best customers. The only witnesses who testified on the main issue were the appellant, Charles Watson, whose deposition was introduced, and his former partner, Frank Hanford, who appeared as a witness on behalf of the respondent. From the latter's testimony, it appears that the appellant, Watson, was temporarily in the East at the time of the giving of the note; that, prior to his leaving Seattle, the two partners had agreed to make a subscription in support of the battleship enterprise; that in pursuance of such agreement, he executed the note in the name of the firm; that upon the return of appellant Watson, the witness Hanford advised him of the execution and amount of the note, and that the appellant assented to and ratified the same. The appellant, Watson, in his deposition, denied that his co-partner, Hanford, was authorized to execute the note, or that appellant ever ratified the same. Appellant now contends that, as the burden of proof was upon the respondent to show not only the execution of the note but also that the same was authorized, and that as testimony affecting the main facts to be proven has been given by one member of the firm and contradicted by the other, the respondent has failed to sustain the burden of proof resting upon it.

We have carefully examined the evidence and conclude it supports the findings made and the judgment entered. While it is true that one witness testified on behalf of the respondent and one on behalf of the appellant, we are of the opinion

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that the surrounding circumstances are more consistent with, and corroborate the evidence introduced on behalf of, the respondent. The appellant, Watson, himself admits that, upon his return from the East in the spring of 1901, his partner, Hanford, told him the note had been given, and informed him of the amount of the same. He testifies, however, that Hanford did not advise him that the note had been executed in the firm name, and he seems to have inferred that it was given by Hanford individually. In view of the fact that the respondent, Moran Bros. Company, was one of the best customers of the copartnership, that the note was actually executed in the firm name, and that Hanford actually called the attention of his partner thereto, it strikes us as highly improbable that Hanford intended to obligate himself individually, or that he would have given the firm note without the assent of his partner. There would be no reason for such conduct. When we weigh the positive testimony of Hanford, in which he states that he not only gave the note, but that he also advised his partner, who thereupon ratified his act, we conclude that the surrounding circumstances, which are undisputed, corroborate him, and that the respondent has sustained the burden of proof.

It is contended by the appellant that the trial court erred in refusing to admit in evidence certain books of account kept by the copartnership at the date of the giving of the note, the object being to show that it did not appear thereon as a liability of the firm. Mr. Hanford testified that it was their custom to enter upon the books all bills payable or notes given for money actually received; that in such cases it became necessary to enter the money received, and to make a corresponding entry in the bills payable account. The inference from his testimony is that no entry of the note was made for the reason that no money was received, and we fail to see how the introduction of the books could have been material, there being no dispute as to the absence of any

such entry. A failure to make the entry would not bind the respondent if the note was in fact given and ratified by appellant, which seems to have occurred.

The court made and filed its findings of fact and conclusions of law on December 4, 1905. The judgment was entered on December 7, 1905, against the appellant Watson only. He now contends that some suspicion must attach to the fact that the judgment was entered against him alone, and not against the defendant Hanford, and that this circumstance should be taken into consideration by us on the trial of this case *de novo*. The conclusions of law authorized a judgment against Charles Watson, "the defendant served." There is nothing to show that the defendant Hanford was ever served with process. For a period of three days prior to its actual entry, the appellant knew judgment would be entered against him alone. He made no motion for a new trial, nor did he call this circumstance to the attention of the trial court. He also knew his copartner, Hanford, had not appeared by answer or otherwise. In any event, the appellant has a clear right of action against his copartner to compel contribution if he himself is compelled to pay the note.

We find no error in the record, and the judgment is affirmed.

DUNBAR, HADLEY, and ROOT, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

FULLERTON, J. (dissenting)—I think the evidence wholly failed to show liability on the part of the appellant. I therefore dissent from the conclusion reached by the majority.

[No. 6417. Decided November 14, 1906.]

THE CITY OF BELLINGHAM, *Respondent*, v. RAY CISSNA,
Appellant.¹

MUNICIPAL CORPORATIONS — STREETS — AUTOMOBILES — REGULATION OF SPEED ORDINANCE—VALIDITY—STATUTES—CONSTRUCTION. Chapter 154, Laws 1905, p. 293, providing for a state license of automobiles, and declaring that cities shall have no power to require any such license or to exclude automobiles from the free use of the streets, does not prevent a city from limiting the speed of automobiles within its limits to six miles per hour, although laws 1905, § 10, provides that such speed shall not, in thickly settled or business portions of the city, exceed twelve miles per hour; in view of § 12 of said chapter, providing that no greater speed shall be attained than is reasonable and proper, having regard to the traffic, etc.

SAME—CLASS LEGISLATION. The proviso to § 12 of chapter 154, Laws 1905, to the effect that nothing in the chapter shall be construed to limit the power of cities to regulate automobiles which are offered to the public for hire, cannot be construed as showing an intention to limit the power to the regulating of the speed of automobiles kept for private use, as such construction would make the statute class legislation; but the proviso must be construed to relate to usual regulations of conveyances kept for public hire.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered June 26, 1906, after a trial and conviction of the violation of a municipal ordinance regulating the speed of automobiles. Affirmed.

Hardin & Hurlbut, for appellant. The legislature has sovereign control over all streets and highways. *State ex rel. Spokane etc. Tel. Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116; 2 Dillon, Municipal Corporations (3d ed.), §§ 656-680. The legislature could withdraw the power delegated to a city to control its streets and assume sovereign control and regulation thereof by general laws. *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33

¹Reported in 87 Pac. 481.

Pac. 428; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612. The legislature may at any time resume and exercise any power which it delegates. *McQuillan, Municipal Ordinances*, § 43; 1 *Dillon, Municipal Corporations* (3d ed.), § 324; *New England Tel. etc. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835. The power to regulate the use of the streets as to automobiles, except those kept for hire, was withdrawn by chapter 154, Laws 1905, p. 293. The police court was without jurisdiction. *Seattle v. Clark*, 28 Wash. 717, 69 Pac. 407; *State v. Carbon Hill Coal Co.*, 4 Wash. 422, 30 Pac. 728; *Mansfield v. First National Bank*, 5 Wash. 665, 32 Pac. 789, 999. The ordinance contravenes the policy of the state, and if the city had any power in the premises, its exercise of the same could not conflict with the paramount authority. *Duryee v. Mayor of New York*, 96 N. Y. 477; *Mulcahy v. Newark*, 57 N. J. L. 513, 31 Atl. 226; *People v. Furman*, 85 Mich. 110, 48 N. W. 169; *Mayor etc. of New York v. Nichols*, 4 Hill 209; *Dillon, Municipal Corporations* (4th ed.), §§ 239, 330, 368; *Tiedeman, Municipal Corporations*, §§ 2-8-32; *Canton v. Nist*, 9 Ohio St. 439; *Marietta v. Fearing*, 4 Ohio 390; *Thompson v. Mount Vernon*, 11 Ohio St. 688; *Collins v. Hatch*, 18 Ohio 523; *Adams v. Albany*, 29 Ga. 56; *Sill v. Corning*, 15 N. Y. 297; *Wood v. Brooklyn*, 14 Barb. 425; *Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453; *Katzenberger v. Lawo*, 90 Tenn. 235, 16 S. W. 611, 25 Am. St. 681, 13 L. R. A. 185; *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac. 358, 74 Am. St. 602, 44 L. R. A. 508; *Grant v. De Lamori* (Cal.), 14 Pac. 314; *In Re Ah You*, 88 Cal. 99, 25 Pac. 974, 22 Am. St. 280, 11 L. R. A. 408; *Ex Parte Solomon*, 91 Cal. 440, 27 Pac. 757; *Kehr v. Commonwealth* (Ky.), 83 S. W. 633; *Thrower v. Atlanta*, 124 Ga. 1, 52 S. E. 76, 110 Am. St. 147, 1 L. R. A. (N. S.) 382 and note; *Grand Rapids etc. Power Co. v. Grand Rapids etc. Gas Co.*, 33 Fed. 659; *Petersburg v. Metzker*, 21 Ill. 205; *State v. Langston*, 88 N. C. 692.

Henry C. Beach, for respondent.

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Crow, J.—In August, 1904, the city of Bellingham enacted ordinance No. 50, § 2 of which made it unlawful for any person to ride or drive an automobile on its public streets at a greater rate of speed than six miles per hour. On May 5, 1906, a complaint was filed before H. B. Williams, police judge of Bellingham, charging that the defendant, Ray Cissna, did, on May 4, 1906, ride and drive an automobile on Holly street, in the city of Bellingham, at a greater rate of speed than six miles per hour. On trial before the police judge, and also on a second trial after appeal in the superior court, the defendant was convicted and fined. From the final judgment of the superior court, this appeal has been taken.

Upon being arraigned, the appellant demurred to the complaint on the grounds, (1) that the court had no jurisdiction of the person of the appellant or the subject-matter of the action; (2) that the respondent had no legal capacity to bring this action; and (3) that the complaint did not state facts sufficient to constitute a misdemeanor, offense or cause of action. This demurrer, which was overruled by the police judge, was afterwards urged in the superior court and again overruled. Appellant assigns error on the order overruling the demurrer, and contends that it questions the validity of said § 2, of ordinance No. 50, which regulates speed in the driving of automobiles. He contends that the delegated power under which the city ordinance was originally passed has, in so far as automobiles kept for private use are concerned, been withdrawn by chapter 154, page 293, Laws of 1905, which act he insists declares the policy of the state in the matter of the regulation of such vehicles. The appellant further contends that § 12 of the act of 1905 deprives the city of any power to pass or enforce an ordinance requiring the owner of an automobile to obtain a license to use the streets; or excluding from such use of the streets any automobile whose owner has complied with the provisions of said

act. There is no contention but that appellant was the owner of the automobile in question; that he kept it for his private use; that he held a certificate from the secretary of state under the act of 1905; and that he rode or drove his automobile over Holly street at a greater rate of speed than six miles per hour. If § 2 of ordinance No. 50 is valid then the appellant was rightfully convicted. Otherwise he should be discharged

Chapter 154, Laws of 1905, requires the owner of an automobile to file a description thereof with the secretary of state and obtain a numbered certificate for which he pays a certain fee. By § 10 it is provided that no driver or operator in charge of any automobile shall permit the same to be driven or operated within the thickly settled or business portion of any city or village at a greater speed than one mile in five minutes, nor over any crossing or crosswalk within the limits of any city at a rate faster than one mile in fifteen minutes, when any person is upon the same. By § 12 it is provided that:

"Cities, towns and counties shall have no power to pass, enforce or maintain any ordinance rule or regulation requiring of any owner or operator of any automobile or motor vehicle, any license or permit to use the public roads, highways, park or parkways, streets or avenues, or excluding or prohibiting any automobile or motor vehicle whose owner has complied with sections 2, 4 and 5 of this act from the free use of such public road, highway, park or parkway, street or avenue, and all such ordinances, rules and regulations now in force are hereby declared to be of no validity or effect: *Provided*, That nothing in this act shall be construed as limiting the power of local authorities to make, enforce and maintain ordinances, rules or regulations, in addition to the provisions of this act, affecting automobiles or motor vehicles which are offered to the public for hire."

The contention of the appellant is, that as § 12 secures the free use of the public roads, highways, parks, streets, etc., to the owners of automobiles, the city council is there-

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fore prohibited from enacting any speed ordinance such as the one here involved. We do not interpret this language as it seems to be understood by the appellant. We understand the word "free" to be used for the purpose of prohibiting a city from collecting any additional license or fee from owners of automobiles kept for private use, or making the payment of the same a condition precedent to the use of its streets. We understand that payment of the certificate fee to the secretary of state entitles the owner of an automobile kept for private use to the free use of all streets and highways within the state, whether within or without the corporate limits of any municipality. Although § 10 limits the speed of automobiles to one mile in five minutes within the thickly settled or business portion of any city, § 11 provides that:

"No person driving or in charge of any automobile, or motor vehicle on any highway, townway, public street, avenue, driveway park or parkway, shall drive the same at any speed greater than is reasonable and proper, having regard to the traffic and use of the way by others, or so as to endanger the life or limb of any person; and racing such vehicle on any such way or parks is hereby forbidden."

This section was undoubtedly included in the act for the purpose of requiring drivers of automobiles to reduce their speed when necessary to even less than twelve miles per hour, and, in its enactment, the legislature undoubtedly had in contemplation the safety of the general public upon streets and highways, which are more or less crowded according to the frequency of their use and the density of population.

By Bal. Code, § 739 (P. C. § 3732), power has been granted to the city of Bellingham to regulate and control the use of its streets, and that power still exists to its full extent as then granted, unless it has been limited by the act of 1905. As § 11 seems to contemplate that it may, at times, become necessary to require a less rate of speed than twelve miles

an hour, we fail to understand why the council of the city of Bellingham is not still entitled, under § 739, *supra*, to pass and enforce an ordinance for the reasonable regulation of such speed, even though fixed at less than twelve miles per hour.

We think the evident purpose of the act of 1905 was to provide a uniform system for the regulation of automobiles, and a single certificate or license fee within the state. Otherwise the owner of an automobile kept for private use might be required to pay a license fee in every city of the state through which he might travel when using such vehicle. We do not understand that the words "free use of such public road," etc., as employed in § 12, conferred upon the owner of an automobile an absolute right to travel the streets of any city at such rate of speed as he might desire, provided he did not exceed twelve miles per hour, or that, by reason of such enactment, the municipal authorities could not by ordinance prevent him from so doing.

It might, upon a casual examination of the act of 1905, appear from the proviso contained in § 12, that the state has reserved to itself the exclusive right to regulate the speed of all automobiles kept for private use only, while permitting local authorities to regulate the speed of those which are offered to the public for hire, but the direct result of such an interpretation would be to hold that although one citizen, driving an automobile kept for private use only, would not be subject to municipal control in the matter of speed; yet another citizen would be subject to such control if he happened to drive an automobile which was offered to the public for hire. An ordinance regulating speed in the one instance, and not in the other, would be class legislation and invalid, and a statute authorizing such class legislation would also be void. It is our duty to construe the statute in such a manner as to sustain its validity if we can possibly do so.

Our view is that the proviso does not contemplate ordinances, rules, or regulations pertaining to the speed of auto-

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mobiles which are offered to the public for hire. Such automobiles are in many respects similar in their uses and purposes to other vehicles kept for hire. The legislature evidently intended that they might be subjected to like rules and regulations by the local authorities, in so far as the same might be practical. It is customary for municipalities to regulate the rates of fare charged by the owners of cabs, carriages or other vehicles offered to the public for hire; and to designate the stands or locations which they may occupy upon the public streets. We think regulations such as these, and others that might be mentioned, are contemplated by the proviso contained in § 12.

The ordinance in question was not annulled by the act of 1905. The statute merely prohibits the enactment of any ordinance requiring any license or permit to use the public streets. The ordinance in question does not provide for any such license or permit, nor does it exclude the appellant from the free use of the streets of the city of Bellingham. This being true, we are unable to understand how it comes into conflict with the act upon which the appellant relies. If it had been the intention of the legislature to provide that no municipal ordinance regulating speed of automobiles should be permitted, it could have so stated. Having failed to do this, we think the construction for which appellant contends cannot be sustained.

The judgment is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, RUDKIN,
and ROOT, JJ., concur.

[No. 6334. Decided November 14, 1906.]

**JOSHUA PEIRCE *et al.*, Appellants, v. NATIONAL BANK OF
GERMANTOWN, Respondent.¹**

JUDGMENT—ENTRY—STATUTES—CONSTRUCTION. Bal. Code, § 4804, providing that upon proof of default, the court "shall" thereupon enter judgment, is not mandatory in the sense that failure to enter judgment immediately will result in loss of jurisdiction.

ACTIONS—ABANDONMENT—DELAY IN ENTERING JUDGMENT—NOTICE. An action is not abandoned by the delay of four years, after entry of default, in proceeding to judgment, and judgment then entered without notice to the defendant is not void.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 3, 1906, upon sustaining a demurrer to plaintiff's complaint, dismissing an action to quiet title. Affirmed.

T. L. Stiles, for appellants.

C. M. Easterday, for respondent.

FULLERTON, J.—The appellants brought this action to remove a cloud from title. In the complaint it is alleged that the appellants are the owners of certain real property situated in the county of Pierce; that on August 27, 1892, in an action brought in the superior court of that county, the respondent recovered a judgment against Joshua Peirce for the sum of \$1,489 on a contract for the payment of money; that on August 23, 1898, a few days before an action would have been barred by the statute of limitations, the respondent brought an action against him on the former judgment, and caused summons to be personally served on him in the manner required by statute; that he made no appearance in the action, and on December 22, 1898, the respondent caused the summons with proof of service, an affidavit of no appear-

¹Reported in 87 Pac. 488.

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ance, and a formal motion for default and judgment, to be filed with the clerk; and that the matter was then suffered to rest until March 25, 1908, a period of four years, three months and four days, when judgment was entered as of the last-mentioned date without further notice to Peirce. The complaint concludes with the allegation that the judgment was entered without jurisdiction and is for that reason void, and that it constitutes a cloud upon the plaintiff's title which prevents the sale and disposition thereof. The prayer is that the judgment be decreed to be void, and ordered cancelled of record.

To this complaint a demurrer was interposed and sustained. The appellants thereupon elected to stand on the complaint, when a judgment of dismissal was entered. The appeal is from that judgment.

To sustain their complaint, the appellants make two contentions: First, that the statute providing for the entry of default judgment upon contracts for the recovery of money only makes it mandatory upon the court to enter judgment immediately upon the filing of the proof of service; and, second, that by the long and unexplained delay in entering its judgment, the action was abandoned by the plaintiff, and the court was without jurisdiction, at the time it purported to enter judgment, to enter any judgment in the case.

The statute relied upon to sustain the first contention is found at § 735 of Pierce's Code (Bal. Code, § 5090). This section provides that in any action arising on contract for the recovery of money only, the plaintiff may file proof of personal service of the summons and complaint on one or more of the defendants, and that the court "shall" thereupon enter judgment for the amount claimed. But we cannot think this statute mandatory in the sense that it requires the court, under the penalty of a loss of jurisdiction over the subject-matter of the action, to enter judgment immediately on the filing of proof of service on one or more of the defendants. The section is only one of a number enacted to

govern the practice in civil actions, and to construe it as being mandatory would render it out of harmony with such others. To illustrate: Certain sections give a defendant a fixed time, varying according to the place of service, the shortest of which is twenty days, in which to appear and answer after service is made upon him. Others again prescribe the mode and manner of service, and the character of the return that shall be made by the officer or person making the service. These permit the return to be filed with the clerk at any time after the service is made, whether or not the judge of the court or the plaintiff is present, and whether or not the time in which the defendant has to appear and answer has expired. It is plain that, if the statute is mandatory, a plaintiff may unwittingly lose his right to a judgment through no fault of his own, as he has no means of knowing when the return will be filed; or the court may be compelled to enter a judgment before the time of service has expired, since the officer making the service need not wait for that length of time before making and filing his return of service. While other examples might be given, these are sufficient to show that the statute cannot receive a mandatory construction without the necessity of radical changes in the existing practice.

The other contention is of more moment, but we do not think it fatal to the validity of the judgment. Had the defendant, after the lapse of a reasonable time, and before judgment was finally entered, moved the court to dismiss the action for want of prosecution, doubtless the court would have been justified in granting the motion, especially in the absence of a showing that there was some just cause for the delay. And it may be that the trial court would have been justified, on its own motion, in refusing to enter judgment after so long a delay, at least, until further notice was served on the defendant. But after judgment is entered, we think the defendant's right to have the action dismissed for mere delay is foreclosed, and that any successful attack on the

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judgment must be based on grounds that would have required its vacation if entered when the action first became ripe for judgment. Any other rule, it seems to us, would result in uncertainty, as there could be no way of determining whether a given judgment was void or valid.

The cases cited by the appellants, as we read them, do not support their contention. The case of *Den, ex dem. Rutherford v. Fen, Folger, Tenant*, 20 N. J. L. 299, is most nearly in point, but there is a wide difference between that case and the one at bar. That was an action in ejectment brought against the casual ejector, Richard Fen, and the tenant in possession, without joining the real owner of the land. The tenant afterwards became a lunatic and ceased to occupy the premises. Nothing was done in the action until a lapse of nearly twenty years, when the plaintiff moved for judgment against the casual ejector. This motion was denied by the trial court, and its ruling was affirmed on appeal. In the case before us the trial court did not refuse to enter judgment. The question in the one case was, therefore, did the trial court abuse its discretion in refusing to enter judgment after so long delay, while in the other it is, is the judgment void. As we think the judgment not void, the judgment appealed from must be affirmed. It is so ordered.

MOUNT, C. J., HADLEY, DUNBAR, CROW, RUDKIN, and ROOT, JJ., concur.

[No. 6271. Decided November 14, 1906.]

LOUISE M. PLATTOR, *Respondent*, v. SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

APPEAL—REVIEW—NEW TRIAL—VERDICT WHEN SUPPORTED. The fact that plaintiff swore falsely in the identification of a conductor on a street car would only affect her credibility in relation to the material facts testified to, and would not warrant the setting aside of a verdict on the theory that her testimony, which was uncorroborated, was false.

CARRIERS—NEGLIGENCE IN STARTING CAR—QUESTION FOR JURY. The negligence of a street car conductor in starting a car before a passenger is able to take her seat is for the jury, where the passenger was a woman weighing two hundred and sixty-eight pounds, and was leading by the hand a child two years of age, and where the conductor had had his attention especially called to her condition, and started the car as she got inside the door, and before she had time to take a seat.

Appeal from a judgment of the superior court for King county, Hatch, J., entered November 18, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained by a passenger in the negligent starting of a street car. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Clay Allen, for respondent.

DUNBAR, J.—An examination of the record warrants us in adopting the statement made by the appellant in this case. Plaintiff claims to have been injured by the negligence of the defendant company as follows: She was forty-five years of age, weighing at the time two hundred and sixty-eight pounds. No pretense was made that she was feeble, or that she was not able to handle herself, or get on or off cars with-

¹Reported in 87 Pac. 489.

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out assistance. She approached one of the defendant's cars, having with her a child two years old, which was able to walk, and which she was leading by the hand. The car upon which she took passage was one of the ordinary cable cars, with open seats at either end, the center of the car being closed. When the car stopped at the place she was standing, she lifted the child, and attempted to put it upon the platform of the car. The car, however, started before she was able to get on, and she pulled the child back off the platform while the car advanced about ten feet. She then followed the car, placed the child upon the platform, got on to the platform herself, holding the child by the hand and permitting it to walk in front of her, passed through the door into the inclosed portion of the car. After she passed through the door, the signal to start the car was given, and she describes what befell her then as follows:

"Q. After you passed through the door of the car, tell the jury exactly what happened, just describe to them exactly. A. Just as I passed through the door the signal was given for the car to start, and immediately the gripman responded, throwing me forward with a jerk of the car. Q. Indicate on here where you were. A. I was just inside the door when the signal was given. Q. Where had you taken a seat? A. I had not had time to start to take my seat; I was inside of the door. Q. About what position in there were you when the car pushed forward—started? A. Why, I wasn't over a foot from the door of that car when the car gave a lurch, throwing me forward. Q. In what position relative to the seat of this car were you when the car actually started? A. I hadn't had time to turn myself around to sit down. Q. Where was the baby at that time? A. Right in front of me and I had hold of her hand. Q. Describe to the jury just exactly what happened when the car started. A. It threw me forward with a lurch. Q. And then what did you do? A. I threw out my hands and caught on the opening below the window to save me going to the floor. Q. What happened next; tell the jury. A. I caught myself on the window and seated myself, fell on the seat striking my limb on the edge of the seat."

It does not appear that there was anything extraordinary about the movement in starting the cable car, or that the starting was in any wise different from the ordinary and usual movement of the cable car in starting. During the trial the plaintiff identified one Evett as being the conductor in charge of the car at the time she was injured. It is claimed by the appellant that it is established beyond controversy that Evett was not the conductor on the car upon which the respondent claims that she was riding at the time of the alleged injury, and the assignments of error are that the court erred in overruling defendant's challenge to the sufficiency of the evidence and in overruling defendant's motion for a new trial. These assignments are based upon two questions: (1) Did the plaintiff, assuming her story to be true, establish negligence on the part of the defendant company in the operation of its cars? (2) Shall a verdict for the plaintiff be permitted to stand in a case of this nature, when it has been established, with almost the certainty of a mathematical demonstration, that the story of plaintiff, which was uncorroborated, was false?

We will first notice the second proposition. Of course, if the fact were established that the story of plaintiff was false, the verdict should not be allowed to stand. But the statement assumes the question in controversy. We do not think that the mere fact that the respondent swore positively that Evett was the conductor on the car upon which she alleged she was hurt would necessarily prove that the testimony, in relation to the material fact of whether or not she was hurt in the manner described by herself, was untrue, even conceding that it is conclusively proven that Evett was not the conductor operating the car at the time. An examination of the whole record has failed to convince us that the respondent intended to deliberately swear falsely in her identification of Conductor Evett. The most that can be adduced from the whole record is that she was mistaken. At least, it was only a question that affected the credibility of her

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testimony, and that was a question which was properly submitted to the jury.

The next proposition, first stated by the appellant, involves the question of whether, conceding the statement of the respondent to be true, there was any negligence on the part of the conductor, or any duty on his part to see that she had reached her seat before starting the car in the manner in which it is alleged and proven that it did start. Many cases are cited by both the appellant and the respondent, but the citation of authorities on this question is of little benefit, for the reason that it is conceded by the appellant that negligence might well be permitted to be predicated upon the fact that a car was started before a passenger, who was manifestly weak, crippled, or infirm, had reached a secure seat; while the respondent concedes that the weight of authority, as well as the experience on which these authorities base their conclusions, do not require in all cases, and under all circumstances, a street railway operator to wait until a passenger shall have had time and opportunity to reach a seat, before starting the car. No two cases are exactly alike, so far as the appearance of the party injured and the surrounding circumstances are concerned, and the question in this case is not so much what the general law is, as under what principle of law the facts in the case fall.

The correct principle, which is deducible from all the better reasoned cases, is that the conductor, having supervision and control of the car and of the passengers on the car, must exercise that supervision in a reasonable way, taking into consideration the appearance of the passengers, and the circumstances surrounding them. It is the infirmity of the passenger, and his incapacity to protect himself, that he must take notice of, no matter whether that infirmity is produced by age or from being crippled, or from the ravages of disease or from excessive obesity. Or it might be that a passenger who was young, agile and alert, would be incapacitated from protecting himself from the sudden lurch of a car

for the reason that his hands were occupied by holding a child or some other burden. In all such cases the conductor should see that the passenger has time to obtain his seat before the car is started with such suddenness as to imperil his safety. This, doubtless, is more or less burdensome upon the conductor, but it is a burden imposed in the interest of common humanity, and for the welfare of the public.

Under this rule the question then is, was there anything in the appearance of the respondent which would indicate to a watchful conductor that she required more than ordinary consideration? It cannot be denied, as a rule, that excessive flesh is burdensome, rendering its unfortunate possessor more or less helpless and clumsy. This woman was five feet and four inches in height, and weighed two hundred and sixty-eight pounds, being about twice the weight of the ordinary woman of her height, a condition which should have challenged the attention of the conductor in whose care and charge she had placed herself. Besides this, she was burdened with the care of a little, toddling child, just able to walk, which ought to have been the especial care of the conductor; and one of her hands was engaged in trying to direct and protect the child at the time of the accident. In addition to this, the conductor's attention had just been called to the slow, clumsy condition of respondent, by her ineffectual attempt to board the car with the child, necessitating the stopping of the car a second time for the purpose of allowing her to get on. We think this was a case calling peculiarly for special care on the part of the conductor, and that there was ample testimony to sustain the verdict of the jury.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, FULLERTON, and HADLEY, JJ.,
concur.

Crow and Root, JJ., took no part.

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[No. 6395. Decided November 14, 1906.]

O. O. ROWLAND, *Respondent*, v. THE P. P. CARROLL LOAN
& INVESTMENT COMPANY, *Appellant*.¹

CORPORATIONS—CONTRACTS—AUTHORITY OF OFFICER—RATIFICATION. The evidence is sufficient to establish that a contract of employment as engineer for a new townsite, made by the president of a corporation, was authorized or ratified by the corporation, where it appears that the contract was made with the knowledge of a majority of the trustees, that the company took options, purchased supplies, and dealt with the operations in its own name, with the president in charge in the name of the company, which received the benefits of the contract; since such employment was within the scope of the general management and apparent or implied authority of the president.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 19, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contract of employment. Affirmed.

Walter B. Beals, P. P. Carroll, and John E. Carroll, for appellant.

J. B. Alexander, for respondent.

DUNBAR, J.—This action was brought by respondent against appellant to recover for services as civil engineer, alleged to have been rendered appellant at the proposed town of Harriman, at what is called Dofflemyer's Point, in Thurston county. Respondent claimed to have been employed by appellant on April 1st, 1904, at the agreed salary of \$300 per month, and to have continued in such employment until August 31, 1904; and demanded judgment for \$1,355. The answer was a general denial. The case was tried by the court, which found that the plaintiff, at the special instance

¹Reported in 87 Pac. 482.

and request of the defendant, acting through its duly authorized president, P. P. Carroll, agreed to enter the employ of the defendant company as civil engineer, and the engineer to be placed in charge of the works and operations of the said company then, and to be subsequently, conducted at the proposed town of Harriman; that it was then and there agreed between the plaintiff and the defendant company that the plaintiff should be paid a salary by the defendant of \$300 per month, that the plaintiff entered upon such employment and performed services for three months; that, by reason of such contract and rendering of service, there became due from the defendant to the plaintiff the sum of \$900; that no part thereof had been paid except the sum of \$145; that the sum of \$755 is due from the defendant to the plaintiff; and concludes, as a matter of law, that the plaintiff was entitled to judgment against the P. P. Carroll Loan & Investment Company, a corporation, for the sum of \$755 with costs and disbursements, and judgment was entered accordingly. From this judgment this appeal was prosecuted.

Defendant excepted to the findings of fact and conclusions of law made by the court.

Appellant, in its testimony, denies that respondent or any other person was ever employed by it. It admits that a town was to be built at Harriman, but claims that P. P. Carroll as an individual, and not the appellant corporation, was carrying on the work there, and that respondent, if he was employed at all, was employed by said Carroll. The P. P. Carroll Loan & Investment Company was incorporated under the laws of the state of Washington on July 30, 1903. The following were the officers elected: Trustees, P. P. Carroll, S. J. T. Carroll, F. M. Carroll, J. E. Carroll, O. G. Carroll: President, P. P. Carroll; vice-president, F. M. Carroll; treasurer, O. G. Carroll; secretary, John E. Carroll.

The main contention of the appellant is that the respondent does not show any authority in P. P. Carroll to employ him for the appellant corporation. But the record discloses

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that the appellant company maintained its office at the same place that P. P. Carroll maintained his office; that P. P. Carroll used the letter heads of the company in his correspondence with respondent; that contracts were entered into in the name of the company with the knowledge and acquiescence of at least three of the five trustees; that the other two trustees did not testify at the trial; that John E. Carroll, secretary of the company, and son of P. P. Carroll, president of the company, prepared a price list of the lots platted in the town of Harriman; that the appellant company dealt with the state of Washington with reference to the purchase of tide lands at the place of operation; that it took options on the land in its own name; and that the president and the respondent contracted for, and purchased supplies for the enterprise at Doffemyer's Point, with the knowledge of the president and secretary of the company. The record does not show that these particular acts were authorized at any formal meeting of the board of trustees, but it does show that, by its action and acquiescence, it clothed its officer, the president, with authority to act for it, and if a corporation intentionally or negligently clothes its officer or agent with authority to act for it in a particular matter it will be estopped to deny its authority as against persons dealing with him in good faith. 3 Clark & Marshall, Private Corporations, § 697. The record shows conclusively, by the whole course of conduct of the appellant company and its officers, that at least a majority of the board were aware that P. P. Carroll was in charge of such an enterprise in the name of the appellant company, and that they consented to and acquiesced in his contracts and management, and received the benefit of the contract of employment sued upon in this case. The record convinces us that the corporation authorized its president and manager to conduct and manage the business of the town of Harriman, and that the contract entered into with the respondent was within the scope and contemplation of such general management.

"When an officer or agent is intrusted with the general management of the business of a corporation, or a particular part of the business, he has apparent or implied authority to manage the same in the usual way, and for such purpose to bind the corporation by his acts and contracts on its behalf." 3 Clark & Marshall, Private Corporations, § 707.

It is not in harmony with any sound code of ethics, and is not the policy of the law, to permit a solvent corporation to obtain and appropriate the property of another on the credit of its solvency, and then escape responsibility by hiding behind some impecunious officer of such company. On all the disputed questions of fact in relation to the terms of the contract, and the amount of labor performed under such contract, we are not inclined to disturb the findings of the trial court. The judgment is affirmed.

CROW, FULLERTON, and HADLEY, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

ROOT, J., dissents.

[No. 6442. Decided November 14, 1906.]

CHRIST LOSNES, *Respondent*, v. J. LEROY AND GREAT
NORTHERN RAILWAY COMPANY, *Appellants*.¹

MASTER AND SERVANT—INJURY TO CAR REPAIRER—CONTRIBUTORY NEGLIGENCE—FAILURE TO DISPLAY SIGNAL. A car repairer who was injured while working between two cars, by reason of the coupling on of a switch engine, is guilty of contributory negligence precluding a recovery, where he failed to protect his position by displaying a blue flag in accordance with the rules and custom of the company, with which he was familiar.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 28, 1906, upon the ver-

¹Reported in 87 Pac. 502.

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dict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained by a car repairer. Reversed.

L. C. Gilman (*B. O. Graham*, of counsel), for appellants.

John E. Humphries, *Geo. B. Cole*, and *John C. Murphy*, for respondent.

DUNBAR, J.—This is an action for damages for personal injuries. Plaintiff was in the employ of the defendant company as a car repairer, and was informed by the foreman that a casting would arrive during the day from Interbay, which should be placed upon the end of a car standing upon track No. 4, and was directed by the foreman to secure said casting upon its arrival and bolt it in place upon said car. Upon the arrival of the casting, the plaintiff, who had been engaged in making some repairs upon a car standing on track No. 3, a parallel track and near track No. 4, left the place where he had been making such repairs and placed himself between a baggage car and a mail car which were coupled together on track No. 4. One of the switch engines operating in the yard passed onto track No. 4 and backed down against one of the cars under which plaintiff was working, thereby squeezing plaintiff's head between the buffer irons on said car, and causing the injury complained of. The cause was tried to a jury, and a verdict was rendered in favor of plaintiff for \$15,000. Upon motion for a new trial, the court indicated that he would grant the motion unless the plaintiff would remit the sum of \$7,000. This modification was accepted by the plaintiff, and judgment was entered for \$8,000. From this judgment this appeal was taken.

Numerous errors are assigned by the appellants, which we have not found it necessary to pass upon, in view of the fact that it appears conclusively from the record that there was no proof that the appellants were guilty of negligence, and it

does appear as conclusively that the respondent was guilty of contributory negligence which was the proximate cause of the injury. The following rule was introduced in evidence:

"A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals without first notifying the workmen."

The undisputed testimony in this case is to the effect that this rule was in effect at the time, and had been for a long time prior to the time when the respondent was injured; and while the respondent testified that this rule had never been read to him or made known to him, his testimony as a whole conclusively shows that he was familiar with the rule, and that he governed his actions while repairing cars in accordance with the terms of the rule. He had been working as a car repairer for twenty-four years, and for the appellant company for several months. He testified that the engine came in fifteen minutes earlier than it was expected that day, and that he thought he was going to get through before the engine came in, which was evidently the reason that he did not take the flag from track No. 3 where he was repairing, and place it on track No. 4 where he was at work when he was injured. It is true that he testified that he had no notice, while he was working there, that the engine was going to be backed in against the car, and that it was the usual custom when he was at work there for the brakeman to notify him when the train was coming in. His testimony on direct examination in this regard was as follows:

"Q. What was the usual custom when you were at work there of notifying you when a train was coming in? A. Yes, the brakeman come and tell me all the time when they were going to take the cars out all the time. Q. Did he come this time and tell you? A. No."

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But his subsequent examination shows that he understood that the brakeman would come and tell him when the brakeman was notified that there was a repairer at work, by seeing the blue flag upon the train if in the daytime, or the blue light at night, as shown by the following excerpt from the testimony:

"When the brakeman would come down with the switch engine for some cars, if he found your blue flag out on the end of some cars, then he would come around and tell you that he was going to couple up? A. Yes, and one fellow named Brown tell me—he come out and took the flag off. I ask him what he was going to take the flag off for; he had no right. Q. You knew he had no right to take the flag off from the string of cars? A. Yes. Q. You knew that the only man who had a right to take it off was the man who put it up? A. Yes. Q. But that was some other time; it wasn't this time? A. No. Q. Your flag was over on track 3 where you had been working in the morning? A. Yes. Q. And when the brakeman did notify you that they were going to come in with the engine, it was only when you had your blue flag out on the end of your cars—then he would come around and tell you that he was going to couple on? A. Yes, when I had my blue flag out, he will tell me."

So that it seems that the respondent did not rely upon the brakeman telling him when the engine was going to couple on in the absence of the blue flag appearing, and that he also knew that the man who was doing the repairing, and no one else, had a right to take the flag down. Again, in cross-examination he said:

"Q. You knew there was nothing to warn a trainman when he was coming down with an engine and you were under the car or between the cars, unless you had your flag out? A. Yes. Q. You knew that? A. Yes.

Then upon redirect examination he testified:

"Q. But before this the brakeman would always come to tell you before they would run in there? A. Always, that is so. Q. And you depended upon that? A. Yes, that is so."

There was a great deal of direct and redirect examination, with the evident intention of trying to get the witness to ex-

plain away this direct statement, but the attempt was unsuccessful, and it appeared all the time that, when the respondent testified that he relied upon the notice of the brakeman, he did not expect the brakeman to notify him unless the flag was at the end of the train as he had so frequently testified. He also testified that he had always put his flag out when he worked under the car, and that the reason why he had not put it out at this time was that he would have to walk the length of a few cars to get the flag from No. 3 to put it onto No. 4, and that he thought he could finish the job before the engine came; that he knew what the flag was for, and that he put it there to warn the trainmen that there was going to be workmen under the car and between the cars; and that if he did not put it there, there would be nothing to warn the trainmen that there was going to be anyone under or between the cars. It is true he testified that he had asked for two flags, presumably to save him from walking the length of a few cars to get the flag, his testimony in that regard being as follows:

"Q. Why didn't you take that flag from track No. 3 and put it on track No. 4? A. Pretty near a block I had to walk down after that flag. Q. It was pretty near a block you had to go to get that flag in order to bring it over and put it on that track that you were working on? A. Yes, I thought I would be done before the train come. Q. You thought you were going to get your little job you had on No. 4 track done before the engine came in there, and that was the reason you didn't go down there a block and get your flag and put it on the track? A. I would be too late. Q. That is the reason you didn't go and get the flag off of track No. 3 and put it over on No. 4, because you thought you would be through before the engine came? A. Yes."

Redirect:

"Q. When you were working on both tracks you only put the flag on one? A. Yes. Q. And they knew you were working on the one track? A. Yes. Q. And this day it was on the one track? A. Yes."

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The only inference that could be drawn from this statement on the redirect examination was that the brakeman would take notice that there were workmen working on the track only when the flag was displayed; and while it might have been a little more inconvenient for respondent to walk to the end of the train and get the flag, which he knew according to his own testimony was the only protection he would have against the engine backing down against the train upon which he was working, it was his imperative duty to protect himself against accidents in the manner prescribed by the rule and the customs in that yard with which he was confessedly familiar. Having neglected the safeguards which were provided for him by the company, and having taken chances on his judgment in relation to the time it would take him to do the work, and the time when the engine would probably arrive, he must abide the consequences of the mistake that he made. The company had furnished an efficient protection for him, if he saw fit to avail himself of it. This was a reasonable rule and an efficient one when it was obeyed. There was some attempt to show that the servants of the company could have seen the danger in which this man was placed, and ought to have seen it under the circumstances, and have refused to back the engine down onto the train on which he was working, notwithstanding his failure to place the signal on the train. But we think there is no testimony in the record which will justify this assumption.

At the close of respondent's testimony the appellants moved for a nonsuit, which was refused by the court. This nonsuit ought to have been granted; for, considering the testimony of the respondent alone, no cause for damages was proven against the appellants.

The judgment will be reversed and the cause dismissed.

CROW, FULLERTON, HADLEY, and ROOT, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6252. Decided November 15, 1906.]

B. E. GATES, Respondent, v. DANIEL BEKINS, doing business as the Bekins Moving & Storage Company, Appellant.¹

CONVERSION—DAMAGES—OUTRAGED FEELINGS. In an action for the conversion of goods, damages by reason of the outraging of feelings cannot be recovered.

CARRIERS—OF GOODS—RECOVERY OF GOODS—TENDER OF CHARGES. Where a carrier charges an excessive amount and refuses to deliver the goods until such charge is paid, the owner may maintain an action for conversion without first tendering the proper charge that was due for carriage.

CONVERSION—DAMAGES—TRIAL—INSTRUCTIONS. In an action for the conversion of goods and alleged damage to business by reason of the detention, it is reversible error to instruct the jury that they may bring in a verdict for damages in excess of the value of the property when there was no evidence of any other damages.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 31, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for the conversion of household goods. Reversed.

Craven & Totten, for appellant, upon the point that it was necessary for the consignee to tender the freight charges, cited: *Ohio etc. R. Co. v. Noe*, 77 Ill. 513; *Eveleth v. Blossom*, 54 Me. 447, 92 Am. Dec. 555; 5 Am. & Eng. Ency. Law (2d ed.), 414; *Loewenberg v. Arkansas etc. R. Co.*, 56 Ark. 439, 19 S. W. 1051; *Hutchinson, Carriers* (2d ed.), §§ 447a, 492; *Monteith v. Great Western Printing Co.*, 16 Mo. App. 450; *Van Zile, Bailments and Carriers*, §560; *Cobbey, Replevin*, §§ 514, 516; *Hall v. Tittabawssee Boom Co.*, 51 Mich. 377, 408, 16 N. W. 770; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Schouler, Bailments and Carriers*.

¹Reported in 87 Pac. 505.

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p. 560, note 2; *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612; *Long v. Mobile etc. R. Co.*, 51 Ala. 512; *Scarfe v. Morgan*, 4 M. & W. 270.

Sweeney & Steiner, for respondent.

DUNBAR, J.—This was an action for the conversion of household goods of the alleged value of \$121, brought by respondent against appellant, the appellant defending upon the ground that the alleged conversion was simply a rightful detention of the goods under a lien belonging to him by virtue of an express contract, and also by virtue of the fact that he was a common carrier, to secure the payment of \$20.75 due for carriage charges on the goods, and other goods carried at the same time. Appellant was engaged in the business of moving and storing goods in the city of Seattle.

The complaint, among other things, alleges, that the plaintiff has demanded of defendant that he deliver the remainder of said household goods as per agreement, which defendant has refused and still refuses to do; that the plaintiff is ready, and at all times has been ready, to pay any and all bills presented to him for such services as per his contract with the defendant, and has so informed the defendant; that in addition to the value of the household goods appropriated by the defendant to his own use and benefit, plaintiff has been damaged in his business in the sum of \$1,000, and that his feelings have been outraged. We may say here that this is a straight business transaction in which the outraging of feelings necessarily cannot be involved. The case was tried by a jury, and the verdict was rendered in favor of the plaintiff, the respondent here, for \$621. Appellant's motion for a new trial was denied, upon condition that the respondent remit \$270.75 from the judgment, which said reduction was accepted by respondent. Judgment was then rendered for \$330.25, from which judgment this appeal is taken.

The first contention in this case is that the court erred in instructing the jury as follows:

"If on the contrary you find that the agreement was that he should hold a portion of the goods until the charges for the carriage on them should have been paid, then the plaintiff would not be entitled to recover unless you find that the defendant demanded excessive charges—more than he was entitled to under the contract. I instruct you in that respect that if a common carrier of goods demands a sum in excess of the amount due him for freight charges, the assignee or owner of the goods may maintain an action of this kind against him without making a tender of any part of the amount:"

the contention of the appellant being that it was necessary, as a prerequisite to the commencing of this action, that the respondent should have tendered the amount due for the carriage of the goods.

Upon this subject of tender there is a conflict of authority. Some courts holding that it is necessary for the consignee to tender the amount which he considers right for the carriage of the goods before he can legally commence an action for recovery; others, that a tender is not necessary, especially where there is a controversy as to the amount of freight which is due the carrier, and where the carrier has declined to take less than the charges which he has presented, or where, by his actions and claims, it is manifest that it would be useless for the consignee to tender any amount less than that which was claimed by the carrier. This court held in *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101, that, "Where the carrier demands a sum in excess of the sum due for freight charges, the consignee need not tender any sum before bringing suit."

This decision is criticised by the appellant for the reason that the statement of law announced in that case was not necessary to the decision on the issues involved, and there is some merit in this criticism. To sustain that doctrine we cited, *Adams v. Clark*, 9 Cush. 215, 57 Am. Dec. 41;

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Isham v. Greenham, 1 Handy (Ohio Sup. Ct.) 357. It is also contended by the appellant that *Adams v. Clark* does not sustain the law as announced by the court. But an examination of that case convinces us that, while there were some other features in the case which were incidentally passed upon by the court, the law on this question was announced to the effect that tender is not necessary. The court in passing upon the question at issue said:

"If the defendants illegally withheld the goods from the plaintiff he might have brought an action of assumpsit against them, as well as this action of trover. And, in that action, all that it would have been necessary for him to aver and prove would have been his readiness to pay the freight, upon delivery of the goods. . . . And we are of opinion that all which it was necessary for the plaintiff to prove, in order to maintain this action, was his readiness to pay freight on the goods, upon their being delivered to him, and the defendants' refusal to deliver them unless something more should be first paid."

In *Isham v. Greenham*, *supra*, it was held that the duties of the carrier and consignee are correlative; the one to deliver, and the other to pay the freight being mutual acts. In that case the court said:

"On general principles, whenever the act of one party to whom another is bound to tender money, services, or goods, indicates clearly that the tender, if made, would not be accepted, the other party is excused from the technical performance of his agreement. The law never requires a vain thing to be done. . . . It would have been useless, then, for the plaintiff to have tendered the amount due as freight when he had already been told that it would not be accepted. The claim asserted by the defendant was illegal, and having refused to deliver the cargo, unless that claim was paid, the plaintiff had nothing to do but to regard the carrier's acts as unlawful, and hold him responsible for the value of the property in tort."

The case at bar presents this identical state of facts. A controversy arose between the appellant and the respondent

as to the amount which was due the appellant under the contract for the carriage of the goods. There was no refusal on the part of the respondent to pay what he deemed was the proper amount for the service rendered. A greater amount was claimed by the appellant, and the goods were withheld from the possession of the respondent until that greater amount was paid, and it would have been useless, as shown by the undisputed testimony in this case, for the respondent to have tendered any less amount than that which was claimed by the appellant, so that the respondent had a right to bring this action and submit this question, together with the other disputed questions in the case, to the court.

In *Long v. Mobile etc. R. Co.*, 51 Ala. 512, a case cited by the appellant, it seems to us the proper rule is laid down: namely, that the payment of the freight, and the delivery of the goods, are concomitant or concurrent acts; and if the consignee is ready and willing to pay the freight due, on having the goods delivered to him, and the carrier refuses to deliver them unless he will pay more than is due, the consignee may maintain detinue for the goods, or trover for their conversion, without making a formal tender or paying the money into court, the amount of freight actually due to be adjudicated by the court.

The court in this case, however, instructed the jury as follows:

"If you find in addition that the defendant has been otherwise damaged by reason of the taking and detention of these goods directly, then you should award him that amount. Your verdict for the goods alleged to have been taken must not exceed one hundred and twenty-one dollars and for the remainder must not exceed one thousand dollars; in arriving at a verdict you are to find a verdict in one lump sum."

The giving of this instruction was error, for the reason that there was not a scintilla of testimony offered showing any damage whatever to the business of the respondent, nor was there any attempt on the part of the respondent to make

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any other proof whatever than the value of the goods detained by the appellant. And that it was prejudicial is plainly shown by the verdict of the jury in returning a larger verdict than the alleged value of the goods detained: and on account of this error, it becomes necessary to reverse this cause, for the reason that this court cannot determine what conclusion the jury came to concerning the value of the goods detained, as the proof as to their value was conflicting, and it is not ascertainable whether the jury, if it had been proper to exclude all damages excepting the value of the goods detained, would have found that the goods were worth the sum of \$121.

For this reason the judgment will have to be reversed and the cause remanded with instructions to grant a new trial.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, HADLEY, and ROOT, JJ., concur.

[No. 6321. Decided November 15, 1906.]

JULIUS L. LOEB *et al.*, *Respondents*, v. HENRY J. ASBERRY
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS—ASSESSMENTS—SALE OF LOTS—DEED—
VALIDITY—FAILURE OF PURCHASER TO PAY TAXES. Under Tacoma
city charter, §§ 148-150, providing that the purchaser of lots under
sale for street assessments shall not be entitled to a deed until the
payment by him of subsequent taxes and assessments, such payment
is a condition precedent intended as notice to the owner, without
which a deed is void.

SAME—REDEMPTION FROM SALE. Where the purchaser of lots sold
for street assessments fails to give the owner constructive notice by
the payment of subsequent taxes, the owner may redeem the same at
any time as though no sale had been made, under Laws 1899, p. 234,
§ 5, allowing redemption at any time within thirty days after notice
of the assessment.

¹Reported in 87 Pac. 510.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 10, 1906, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title to lots sold for street assessments. Affirmed.

Charles O. Bates and Charles A. Murray, for appellants.

Shackleford & Hayden, for respondents.

HADLEY, J.—This is an action to quiet title and to effect the cancellation of a deed made in pursuance of special assessment proceedings. The plaintiffs were the owners of certain lots in the city of Tacoma. They were assessed for local improvements, and it was provided that the assessments should be payable in five equal annual installments. The first installment became delinquent, and the city treasurer proceeded to sell the lots at summary sale, as provided by §§ 148, 149 and 150 of the city charter. The defendant, Henry J. Asberry, became the purchaser, and received certificates of sale. He thereafter paid the subsequent installments of this assessment. Section 157 of the city charter provides for redemption from sales made for improvement assessments, upon payment to the city treasurer, for the purchaser, of the amount for which property was sold, with twenty per cent per annum interest, together with all taxes, improvement assessments and costs and charges paid by the purchaser subsequent to the sale, with like interest thereon. If no redemption is made within three years from the sale, the treasurer shall, upon demand by the purchaser or his assigns, and upon the surrender of the certificate of sale, execute a deed. Notice shall first be given the purchaser by the certificate holder that he holds the certificate, and that he will demand a deed. The notice may be either by personal service or by publication in a weekly newspaper published in the city for fully three weeks. If no redemption is made within ninety days from the service of such notice,

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the holder is entitled to a deed. Such deed shall, however, not be executed until after payment of all subsequent taxes and improvement assessments upon the property. The defendant published a notice that he would demand a deed, and thereafter made demand and procured the deed, but did not pay certain other improvement assessments which were then liens against the property, and did not pay the general taxes thereon for the years 1901 to 1904, inclusive. These became liens subsequent to the assessment under which defendant claims, and were all paid by plaintiffs prior to the time the defendant demanded and received his deed.

The ordinance providing for the assessment was passed in pursuance of chapter 146 of the Laws of 1899, authorizing cities of the first class to levy and collect assessments for local improvements. Sections 2 and 3 of that act provide that the city may ordain whether payment shall be made in one sum or by installments, and may fix the times for payments and the rate of interest and penalty for delinquent payments. This ordinance provided that the delinquent installments should draw interest at the rate of ten per cent per annum until paid. The plaintiffs tendered the full amount paid by the defendants Asberry and wife, with ten per cent per annum interest thereon, but the same was refused. The court entered a decree quieting plaintiffs' title, cancelling the said deed, awarding plaintiffs the possession, and also judgment for certain rents which had been paid to the Asberrys by the defendant Bjorkland, a tenant in possession. This appeal is from the decree and judgment.

That appellant Asberry was not entitled to the deed is manifest from the provisions of the city charter which required, as a condition precedent, that he should first pay all subsequent assessments for the local improvements and general taxes. This he did not do. In *Albring v. Petronio*, ante, p. 132, 87 Pac. 49, we recently decided that the failure to perform such a condition precedent rendered the deed

void. The subject was elaborately argued in that case and the argument need not be repeated here. All the reasons assigned there as to the payment of subsequent taxes and assessments being a part of the intended scheme for assisting to bring actual notice home to the owner who has not had personal notice of a sale are applicable here. The plain duty was cast upon appellant Asberry, as the purchaser, to pay these subsequently accruing tax and assessment liens if he wished to maintain the integrity of the sale. When he accepted the certificates of sale he assumed that duty in law, and when he violated the duty, the certificates gave him no right to a deed, but became mere evidence of his payment and of his right to reimbursement, together with interest at the rate fixed by the ordinance for delinquent payments. In other words, the sale as such became ineffective for the reason that title could not be founded upon it, and respondents were not required to redeem from the sale within the three-year period provided by the charter for redemption from summary sales, but were left to their rights for redemption as if no sale had been made. If, therefore, respondents have made their tender within a period allowed to them for redemption from a mere delinquent assessment, appellants must accept the tender. The provisions of chapter 124 of the Laws of 1899, page 234, are also applicable here. That act provides for the issuance of bonds by cities to pay for local improvements, and for the method of payment. Bonds were issued for the improvement, in the case at bar, in pursuance of that statute. Section 5 of that statute provides as follows:

"The owner of any such lot or parcel of land may redeem the same from all liability for said assessment at any time after said thirty days [meaning thirty days after notice to him of such assessment] by paying the entire installments of said assessment remaining unpaid and charged against such lot or parcel at the time of such payment with interest thereon to the date of the maturity of the installment next falling due."

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We have seen that the situation here now is as if no sale had been made, and respondents have, therefore, the clear right to redeem from this mere delinquent assessment, since the above statute permits such redemption by the owner "at any time after said thirty days," upon payment of the entire amount due with interest. No hardship can come to the appellants from such a result. They receive all the money they have paid, with ten per cent per annum interest thereon. If they desired to avail themselves of the benefit of the sale they should have strictly pursued the charter provisions. Statutes for the summary sale of property must be strictly followed, and especially so where the notices to the owner are constructive and not personal.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, and DUNBAR, JJ.,
concur.

Crow and Root, JJ., took no part.

[No. 6090. Decided November 15, 1906.]

TONY F. RICHARDSON, *Appellant*, v. LUCY F. RICHARDSON,
Respondent.¹

DIVORCE—DIVISION OF PROPERTY—PROPRIETY. Where, upon appeal in an action for divorce, the supreme court remanded the case with directions to take further evidence as to the value of the property, and either make division thereof or award the wife a money judgment for her share, it is error to decree the division of a tract of land, the value of which was dependent upon an irrigating ditch carrying an insufficient supply of water, which it would be impractical to use jointly for separate portions of the tract, as such division would be detrimental to the interests of both parties; and a proper money judgment should be awarded to the wife in lieu of a share in such real estate.

¹Reported in 87 Pac. 511.

Appeal by plaintiff from a portion of a judgment of the superior court for Douglas county, Steiner, J., entered August 28, 1905, making a division of property rights, upon awarding defendant a divorce, after a trial on the merits before the court without a jury. Reversed and modified.

Merritt & Merritt, for appellant.

W. J. Canton, for respondent.

ROOT, J.—This action was instituted by appellant for a divorce and settlement of property rights, and for the custody of the children of the appellant and respondent. Appellant's action was based on the ground of adultery. Respondent interposed a cross-complaint, charging cruelty and personal indignities. The trial court granted a divorce to the respondent, awarding to the husband the principal part of the real and personal property, but giving the wife a judgment against him for \$15,000. From that judgment and decree, an appeal was taken to this court, where the same was affirmed as to the divorce, but reversed as to the disposition of the property. 36 Wash. 272, 78 Pac. 920. The children were awarded, three to the appellant and two to the respondent. This court at that time found the evidence too meager to form the basis for a proper adjudication of the property rights. The opinion contained the following directions:

"We therefore remand this case to the lower court, affirming the decree with relation to the divorce—as we think it is not possible for these parties to live together again in harmony—with the disposition, care, custody and control of the children as above indicated, and with instructions to take further testimony to the satisfaction of the court in any manner in which it sees fit, either by commission, or by deposition, or oral testimony, as to the value of the property; and, when such value is ascertained, to divide the property, as it existed at the time of the commencement of the action, equally between the husband and wife, either by a division of the physical property itself, or by awarding a money judgment to

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the respondent for her share of the value of such property, making it a lien upon all the property of the estate until it is paid."

After the remittitur was filed in the superior court, an order was there made appointing a commission consisting of three men to take testimony and make an examination as to the nature, amount, and value of the property belonging to these parties, and to make a report thereof to the court. Said commission examined a portion of the property and took such evidence as was available as to the remaining portions, and made its report to the court, setting forth in detail the character, amount, and estimated value of all of the real and personal property, together with an itemized statement of the indebtedness of these parties. Said commission estimated the entire value of all of the property belonging to these parties at \$48,974, and found their indebtedness to be \$6,433.65. The real estate, mostly in Douglas county, was appraised at \$40,444, and much of it was shown to be dependent for its principal value upon a certain irrigation plant known as the Adrian irrigation ditch, together with the right to a variable amount of water being diverted and conducted from a stream known as Crab Creek. As to this irrigating ditch, the commission, among other things, reported as follows:

"In the spring of each year said community is entitled to divert from said stream into the said ditch, and to use a quantity of water amply sufficient for the irrigation of all of the lands belonging to said community which are so situated that water can be conducted upon and over them from said irrigation plant; but as the season progresses said water gradually falls until there is flowing in said Crab Creek no water available for appropriation in and through said irrigation plant, and late irrigation of any of the lands belonging to said community is not generally possible.

"Your commission further finds that to sever said water right from any of said lands susceptible of irrigation, and

apply the whole of said water right to any particular portion of said lands, would result in great depreciation in the value of said community real property, considered as an entirety, depreciating a portion thereof to such an extent as to reduce it from the grade of valuable agricultural lands to the grade of grazing lands of little value.

"Your commission further finds that a considerable acreage of said real estate not now cultivated is susceptible of irrigation from said irrigation plant so as to make it of equal value in productiveness to any of the lands now irrigated and cultivated."

The commission further reported that a physical division of the real estate could be made, and specific portions awarded to each of the parties without impairment or injury to the rights or interests of either, and proceeded to recommend what portions of the real estate should be awarded to each party, and recommended that each be accorded an undivided one-half interest in and to the Adrian irrigation ditch and the water right appertaining thereto, and that the money and other personal property be divided in a given manner indicated. The trial court adopted the report of the commission, and entered a judgment and decree practically in accordance therewith.

It is strenuously insisted by the appellant that the evidence as to the number of cattle and horses which comprised a large portion of the personal property was unreliable; that it consisted only or principally of the statements of respondent and of a young Indian, neither of whom was in a position to know the actual facts, and both of whom were disposed to be exceedingly partisan. We think there is merit in this contention. It is also urged that the value placed by the commission upon the property was grossly excessive. We are inclined to regard the appraisalment as somewhat too high.

It is strongly urged by appellant that the division of the real estate made by the trial court is detrimental to the interests of both parties. It being shown that the value of

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much of this land depends upon the irrigating ditch and water rights mentioned, appellant urges that it will be absolutely impracticable for him and respondent to jointly use said ditch and water rights, and urges that all of the real estate, including said ditch and water rights, should be awarded to him, and an appropriate money judgment allowed to the respondent. We think his position in this matter is tenable and should be maintained.

It appearing that the real estate awarded to each of the parties is dependent for its value and usefulness largely upon this irrigating plant, and that for a portion of each year the water available therefrom is insufficient to meet the full requirements of said land, it is very evident that the joint use thereof by parties, whose difficulties have been of the serious character herein referred to, would be fruitful of much trouble. For two friendly neighbors to jointly use such water rights and peacefully and satisfactorily apportion the waters when there was an insufficient supply would entail a difficult task. To expect these parties to so do would be to entertain a hope which the common observation of human affairs does not justify. We think the principal part of the real estate and personal property should be awarded to appellant, and a money judgment given respondent. It is difficult to determine the amount of the judgment to be thus allowed her. The value of the property hereinbefore set forth was estimated as of the 4th of April, 1903—the date of the commencement of this action. Since that time the possession and use of nearly all of the property has been with appellant. In an action prosecuted by respondent against appellant for her share of the use of said property from the date of the divorce until August 25, 1905, she recovered a judgment of \$9,150. This judgment was set aside by this court upon appeal, one of the grounds for reversal and dismissal being that the subject-matter was involved in the present action, and to be considered in the final determination

of this case. Bearing in mind that appellant has had the use of this property, and that it has naturally increased in value, and making reasonable allowances for what we think was an excessive appraisalment of the value of the property by the commission, we conceive the following disposition of the property to be equitable and just.

The case is reversed and remanded to the superior court with instructions to enter a judgment and decree as follows: Awarding to the appellant, subject to the indebtedness of \$6,433.65 hereinbefore mentioned, all of the real estate and all of the personal property except as hereinafter specified. There shall be awarded to the respondent the hack and the house and lots in Wilson Creek, and the sum of nineteen thousand dollars in addition to the allowances already received by her, which said money allowance shall be and remain a lien upon all of the real estate awarded to appellant. Said money shall be paid by appellant to respondent as follows: \$1,000 upon the filing of the remittitur with the clerk of the superior court, and the balance within six months from said date with legal interest until paid. Neither party to recover costs in either court. The expense of the commission shall be borne by both parties equally.

MOUNT, C. J., CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

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Citations of Counsel.

[No. 6489. Decided November 19, 1906.]

THE STATE OF WASHINGTON, *on the Relation of H. P.
Gillette, Petitioner*, v. C. W. CLAUSEN, STATE
AUDITOR, *Defendant*.¹

STATES—CONTRACT OF EMPLOYMENT—AUTHORITY OF RAILWAY COMMISSION—COMPENSATION OF EXPERT. Under Laws 1905, p. 145, §§ 2 and 12, authorizing the railway commission "to employ" experts, the commission has power to fix their salary and the same cannot be questioned by the state auditor as excessive, in the absence of fraud (FULLERTON, J., dissenting).

STATE AUDITOR—CLAIMS AGAINST STATE—AUDITING OF. Under Bal. Code, §§ 134 and 147, which provide for the auditing of all claims against the state by the state auditor, except such as are expressly authorized by law to be audited and settled by other officers, the auditor exercises no judgment and discretion but only acts in a ministerial capacity in auditing the claim of an expert authorized by law to be employed by the state railway commission, although the commission is not authorized to "audit" the claim (FULLERTON, J., dissenting).

MANDAMUS—TO STATE OFFICER—JUDICIAL OR MINISTERIAL CAPACITY—PRACTICE UNDER CODE. Under the code, it is immaterial whether mandamus to a state officer is sought to review the exercise of judgment and discretion or acts done in a purely ministerial capacity, as the proceeding is a form of civil action in which any appropriate relief may be awarded.

Application filed in the supreme court October 8, 1906, for a writ of mandate to compel the state auditor to audit a claim for the salary of an expert employed by the railway commission. Granted.

H. A. Fairchild, for relator.

The Attorney General, for respondent, contended, among other things, that the duties of the state auditor in allowing claims is quasi judicial and his discretion cannot be controlled. *Pierce's Code*, § 8391; *Boner v. Adams*, 65 N. C.

¹Reported in 87 Pac. 498.

639; *State v. Hinkson*, 7 Mo. 353; *State ex rel. Lindley v. Clark*, 61 Mo. 263; Bal. Code, § 147; *Angle v. Runyon*, 38 N. J. L. 403. Mandamus does not lie because there is a remedy by action against the state. Bal. Code, §§ 5608, 5756; 19 Am. & Eng. Ency. Law (2d ed.), pp. 720, 745. Mandamus will not lie to control the judicial action of public officers. Throop, Public Officers, p. 785, §820; *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *Kroutinger v. Board of Examiners*, 8 Idaho 463, 69 Pac. 279. The railway commission has no implied power to employ the experts, except at a reasonable salary. *Polk v. State*, 138 Cal. 384, 71 Pac. 435, 648; *United States v. Maurice*, 2 Brock. 96; *Bowe v. United States*, 42 Fed. 761.

RUDKIN, J.—Original application for writ of mandamus. The petition for the writ avers in substance, that the petitioner is, and for many years last past has been, engaged as an expert in ascertaining the cost of construction and cost of duplication of railroads and public works, and is, and for many years last past has been, a qualified expert in ascertaining the cost of construction of railroads and other public work; that the railroad commission of this state, at a regular meeting, duly hired and employed the petitioner to inspect the railroads constructed within the state, and to assist the commission in ascertaining the amount of money expended in the construction and equipment per mile of each and all of said railroads, and then and there agreed to pay the petitioner, from the appropriation provided in the act creating the railroad commission, a salary of \$1,000 per month, and necessary traveling expenses while engaged upon the discharge of his duties, the petitioner to have full charge and direction of the entire work connected therewith, subject to the approval of the commission; that there are approximately 3,700 miles of railroad and side-tracks within the state, and the work connected therewith will necessitate the employment of many engineers and accountants, and the examining and ex-

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perting of maps, profiles, books and records of all of said railroads, together with an examination and survey of the tracks and lines, and requires knowledge and skill of a high degree in order to comply with the provisions of said act; that, in pursuance of said contract of employment, the petitioner duly qualified and entered upon the discharge of his duties on the 21st day of July, 1906, and remained continuously therein until the 1st day of September, 1906, and is still so employed; that at a regular meeting of the railroad commission, held on the 1st day of September, 1906, said commission duly examined, audited and allowed the petitioner's claim for salary up to said date, under said contract of employment, amounting in all to the sum of \$1,364, and the chairman of said commission certified the same to be correct; that said claim was thereupon presented to the respondent as state auditor, but the respondent rejected the same, and refused to draw his warrant on the treasurer for the amount thereof; that the petitioner is the owner and holder of said claim, is the party beneficially interested therein, and has no plain, speedy or adequate remedy at law.

The answer or return of the state auditor admits the contract of employment as set forth in the petition, but avers that the terms of the contract are unreasonable and excessive; denies that the railroad commission had any power or authority in law to audit or allow the claim; admits that the claim was presented as alleged and by him rejected, and avers, by way of an affirmative defense, that the respondent deemed the claim unreasonable and excessive and not a valid claim against the state, wherefore, he rejected and disallowed the same. The issues thus presented involve in a measure the powers of the railroad commission and the functions of the state auditor.

Section 2 of the Railroad Commission Act, Laws of 1905, page 145, provides that

"Said commission may appoint a secretary at a salary of not more than two thousand dollars per annum, and may

appoint such clerks as may be necessary, not to exceed three in number, at a salary of not to exceed twelve hundred dollars per annum each, and such other persons as experts as may be necessary to perform the duties that may be required of them by said act."

Section 12 provides that,

"The commission shall ascertain as early as practicable the amount of money expended in the construction and equipment per mile of every railway in Washington. The commission may also ascertain the amounts paid for salaries to the officers of the railroad or express companies and the wages paid to employees. For the purpose in this section named, the commission may employ sworn experts to inspect and assist them when needed, and from time to time, as the information required by this section is obtained, it shall communicate the same to the attorney general by report, and file a duplicate thereof with the secretary of state for public use, and said information shall be printed from time to time in the annual report of the commission."

The foregoing statutory provisions authorize the contract of employment set forth in the petition. As said by the court in *McCluskey v. Cromwell*, 11 N. Y. 593,

"To employ, is 'to engage in one's service; to use as an agent or substitute in transacting business; to commission and entrust with the management of one's affairs;' and when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life."

Under § 2, *supra*, the commission clearly has authority to fix the compensation of its secretary and clerks, within the limits imposed by the statute, and we think the same power exists as to the experts provided for in §§ 2 and 12 of the act. It is scarcely to be supposed that one whose compensation is measured by no fixed rules would voluntarily enter the employ of the state, and leave the question of his compensation to the discretion of the state auditor, or to the un-

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certainty of litigation after his contract of service was completed, and we do not think that the legislature so intended. On the other hand, it would seem to be in the interest of the state, and in consonance with sound business principles, to know the extent of the state's liability before the indebtedness against it becomes an established fact. For these reasons we are of the opinion that the contract out of which this controversy arose is a binding obligation of the state, and as such is governed by the same rules as any other contract.

"There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor." *People v. Stephens*, 71 N. Y. 527, 549.

Of course, like any other contract, the contract of the state may be impeached for fraud, but no such question is presented by the answer before us. True, the answer avers that the compensation agreed upon was unreasonable and excessive, but, in the absence of fraud, the railroad commission is the sole judge of that question. So long as the legislature keeps within the constitution, and the officers charged with the administration of the law keep within the statute, the state auditor and the courts have no concern with the policy of the law or the methods employed in its administration.

The petitioner contends that the state auditor acted in a purely ministerial capacity in drawing his warrant on the state treasurer upon the presentation of his claim, whereas the respondent contends that he exercised judgment and discretion in its adjustment and settlement. Subd. 1 of § 134,

Bal. Code (P. C. § 8391), provides that it shall be the duty of the state auditor:

“ . . . to audit, adjust, and settle all claims against the state, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers or persons.”

Section 147 (P. C. § 8404), provides that:

“The auditor, whenever he may think it necessary in the settlement of any account or the drawing of any warrant, may examine the party, witnesses, and others on oath or affirmation touching any matter material to be known in the settlement of the account or the drawing of the warrant, and for that purpose he may issue summons and compel witnesses to attend before him and give testimony in the same manner and by the same means allowed in courts of record, and he shall reduce such evidence to writing, and file the same in his office.”

Under these provisions, where the amount of a claim is fixed by law, or where the claim is audited and settled by some other officer or person by express authority of law, the auditor acts in a purely ministerial capacity in drawing his warrant on the treasurer; but in all other cases he exercises judgment and discretion in the adjustment and settlement of the claims presented to him. In this connection the respondent contends that the railroad commission had no authority to audit or adjust the claim in suit, and this is perhaps true. The commission seems to have no express authority to audit and adjust claims, except the traveling expenses of the commissioners, their secretary and clerks, under § 2, and the fees of witnesses under § 14. It is proper that all vouchers for debts incurred by the commission should be approved by the commission for the guidance of the state auditor, but whether such approval is anything more than advisory to that officer we need not now determine. Under the old practice in mandamus the question whether an auditing officer, against whom a writ of mandamus was sought,

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acted in a purely ministerial capacity, or whether he exercised judgment and discretion in the settlement and adjustment of claims presented to him, was one of controlling importance, as the writ would lie in the former case but not in the latter. Under the practice in this state, however, the question whether the officer acts in a purely ministerial capacity or whether he exercises judgment and discretion, seems to be one of little moment, except in so far as it may serve as a guide for the officer himself in the discharge of his official duties.

This court has repeatedly held that a mandamus proceeding under our statute possesses all of the elements of a civil action, and that it is no defense to the writ to show that the officer to whom the writ is directed exercised judgment and discretion and acted in good faith in the disallowance of the claim upon which the application for the writ is based. If any part of the relief to which the petitioner is entitled is by writ of mandamus the court will try out all incidental questions in the mandamus proceeding. Thus, in *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, after reviewing our previous decisions, the court said:

"In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action. The facts stated in the affidavit for the writ may be controverted by a return, raising both questions of law and fact. The return likewise may be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee, as the court may order. Judgment can be entered on the verdict or findings not only directing the issuance of a peremptory mandate, but for damages and costs on which execution may issue. The statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of wilful violation of recognized rights or denials, made in good faith, that the rights contended for exist. In other words, the right to sue out the writ is not made to depend on the character of the dispute, but on what

answer is given to the question, can the ordinary course of law afford a plain, speedy, and adequate remedy? If the ordinary course of law will furnish such a remedy, the writ will not issue; otherwise, it will. It was to avoid circuitry of action, thus doing away with the necessity of resorting to more than one proceeding for the enforcement of a right, that the law was framed."

See, also, *Bacon v. Tacoma*, 19 Wash. 674, 54 Pac. 609; *State ex rel. Dudley v. Daggett*, 28 Wash. 1, 68 Pac. 340, and the numerous cases cited in *State ex rel. Brown v. McQuade*, *supra*. Perhaps the same liberal practice would permit the state auditor to interpose any defense that would be available to the state if sued directly; at least, we concede that much in favor of the respondent for the purposes of this case.

For the foregoing reasons, we are of opinion that the claim in suit is a valid charge against the state, and the writ will issue as prayed.

MOUNT, C. J., CROW, ROOT, DUNBAR, and HADLEY, JJ., concur.

FULLERTON, J. (dissenting) — The majority hold, as I understand the foregoing opinion, that the railroad commission, since they are empowered to employ an expert and fix his compensation, may lawfully contract to pay him any sum they please as long as they are not guilty of fraud in making the contract. I am unable to concur in this holding. It seems to me that it not only puts a too narrow construction upon the statute, but one harmful to the interests of the state as well.

The statute defining the powers and duties of the auditor is cited in the majority opinion. Briefly, it grants to the state auditor power, and makes it his duty,

" . . . to audit, adjust and settle all claims against the state, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers or persons."

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There is in this, it will be observed, no limitation to the effect that the duty and power to audit, adjust and settle, can only be exercised by the auditor where the contract giving rise to the claim has been fraudulently entered into. On the contrary, the only limitation is in the case where the duty has been delegated to some other person; all claims are to be audited, but certain claims may be audited by persons or officers other than the state auditor. As no exception is made in favor of claims incurred by the railroad commission, it must follow that claims against the state created by that body are subject to audit by the state auditor, unless some other person or officer is empowered to audit them. The only other person or body in whom this power could possibly rest, under the existing statutes, is the railroad commission itself, but it is expressly conceded by the majority that they have no such power. I can see no escape, therefore, from the conclusion that the statute vests this power in the state auditor. As power to "audit, adjust and settle a claim," is power to hear and examine it, and after such hearing and examination to allow it or reject it as a whole, or to allow it in part and reject it in part, I think that when the auditor rejected this claim he acted within the powers conferred upon him by the statute, and if the claim is to be paid out of the treasury at all it must be established as a lawful claim by an action against the state, or by some form of legislative relief.

But the majority say that:

"It is scarcely to be supposed that one whose compensation is measured by no fixed rules would voluntarily enter the employ of the state, and leave the question of his compensation to the discretion of the state auditor or to the uncertainty of litigation after his contract of service was completed, and we do not think the legislature so intended. On the other hand, it would seem to be in the interest of the state, and in consonance with sound business principles, to know the extent of the state's liability before the indebtedness against it becomes an established fact."

It seems to me that this reasoning is inconclusive. If the statute is free from ambiguity, a proposition the majority seem to concede, then effect should be given it according to its terms, regardless of any question of inconvenience or difficulty that may arise in procuring some one to perform services for the state on the terms it imposes. Defects in the law, under such circumstances, must be laid to the fault of the law—a fault in the province of the legislature, not of the court, to correct. The claim that it is to the interest of the state that the commission should have the right to fix the amount of the compensation in advance of incurring the liability, is refuted by the facts of the very case at bar. Here, according to the state auditor, the railroad commission have agreed to pay an expert out of the state treasury unreasonable and excessive fees, yet the state, under the rule laid down by the majority, cannot protect itself against the unlawful payment without alleging and proving that the commission have been guilty of fraud in contracting to pay the fees. Surely, if the auditor be correct in his contention, it would be to the best interest of the state to allow it to test the reasonableness of that contract.

But admitting that the statute is ambiguous and in need of construction, I think the majority wrong in holding that the auditing power of the state cannot be permitted to inquire into the reasonableness of a contract made by the railroad commission without first alleging and proving that the commission was guilty of fraud in making the contract. It must be remembered that it is the money of the state that is being expended, and that the financial result to the state arising from the payment of unreasonable and excessive compensation is the same, regardless of the intent with which the contract to pay is entered into. Where, therefore, there is room for two constructions, one of which will protect the state against extravagant claims, while the other will not, I cannot think there ought to be any hesitancy in deciding which one to adopt.

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Syllabus.

In my opinion the relator should be compelled to take issue upon the allegations made by the state auditor, and submit the issue to some tribunal competent to determine questions of fact.

[No. 6375. Decided November 20, 1906.]

JOHN SCHWANINGER, *Respondent*, v. E. J. MCNEELEY & COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCES—INSTRUCTIONS. An instruction that the master is not an insurer of the safety of its employees, but that the law requires that it furnish a safe place, etc., sufficiently complies with the request for an instruction that it is not an insurer of the safety and sufficiency of the appliances employed, and was not required to anticipate accidental happenings.

SAME—COMPLIANCE WITH FACTORY ACT. Where an action for injuries sustained through the failure to maintain reasonable safeguards is tried as an action at common law without any reference to the factory act, it is not error to refuse an instruction to the effect that no statute required the use of such safeguards.

SAME—DUTIES OF SERVANT—INSTRUCTIONS. An instruction relating to the duty to warn a servant of unknown dangers, where he is called from his ordinary duties, is sufficiently within the issues where a servant, whose regular duty was that of fireman, was injured in the adjustment of a belt, through dangers unknown to him, where he had been employed but a short time, although he had frequently adjusted the belt; as the complaint may be presumed amended to conform to proof of such facts, admitted without objection.

TRIAL—INSTRUCTIONS AS TO ISSUES. It is not error to fail to instruct specifically that the defendant controverted the material facts of the complaint by denials, where it appears that the jury must have so understood the issues.

MASTER AND SERVANT—FELLOW SERVANTS. There is no question of fellow servant involved where an employee was injured by defects in appliances causing the throwing of a belt, merely by reason of the fact that a witness thought the accident due to the inexperience of another employee who adjusted the belt upon the pulley on the floor above, where it appears that the accident did not occur until

¹Reported in 87 Pac. 514.

after such adjustment had been made and when the two employees were doing nothing in common; and where the act of such co-employee could not have caused the injury irrespective of the negligence of the master.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered December 9, 1905, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by a fireman through defective appliances in a shingle mill. Affirmed.

Hudson & Holt, for appellant.

Frank C. Park, Ellis & Fletcher, and *R. E. Evans*, for respondent.

HADLEY, J.—This is an action to recover damages for personal injuries. The plaintiff was in the employ of the defendant as fireman in its shingle mill. He was required to shovel sawdust, shavings and pieces of slabs into the stoke holes of the three boilers situated in the mill. He worked upon an elevated platform, raised above the first floor of the mill so as to bring the platform, with openings therein, over the stoke holes through which the fuel was thrown into the ovens. The fuel was deposited upon the platform by conveyors. Running parallel with the ovens and the platform was a main line shaft, which was about two feet above the platform, and was fastened to a large perpendicular post at the end of the platform. Attached to this shaft was a pulley, eight inches wide and at least twenty inches in diameter, which was located near the large post. An eight-inch belt ran from this pulley to a large pulley on the floor above, which propelled a long shingle block conveyor that brought blocks over from the sawmill to the shingle mill. The shaft of the pulley above was not directly over the other one, but was so situated that the belt ran at a slight angle. A two-by-six board was nailed on the floor above, under the upper pulley and across the opening through which the belt ran, so that when the

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belt was thrown from the upper pulley, it dropped down and hung across this board, and the slack of the belt fell down on the pulley below. The lower pulley revolved rapidly and would burn the belt when the slack hung on it. Plaintiff was instructed to hang the belt on a peg above the pulley when it was thrown from the upper pulley, in order to save it from burning. The shingle block conveyor consisted of a long, heavy chain, which was drawn through a conveyor box.

The testimony submitted by the plaintiff was to the effect, that the conveyor box was worn and that there were holes in it in which blocks would catch; that at times the chain would catch on the sprocket wheels; that pieces of iron were nailed over the holes in the conveyor box, which became loose, and that the chain would catch on them; that sometimes blocks would catch between this conveyor and a cross-conveyor and throw the chain from the sprocket wheels; that, whenever the conveyor chain was caught, the belt was either thrown from the upper pulley or something would break; that the conveyor had caused annoyance of this kind for several months prior to the accident, and that some days the belt was thrown off, by the catching of the chain, a number of times. It was also testified that the most of the belt was practically new, but that a part of it was old and worn and in some places soft and thin; that when the belt came off above, the plaintiff hung it on the peg below to keep the pulley from burning it, but that when they wished to have it put on the pulley some one shouted to him from above or motioned to him, and he would take the belt off the peg and place it upon the pulley; that with his hands he kept it from running off sideways until some one above would adjust it to the upper pulley, when it would start running, and he would then turn around to his work of shoveling fuel some six feet away; that when the belt came off above and the soft parts happened to strike the pulley, the revolving of the pulley had a tendency to wind it over and fold it around the pulley.

It was testified that at the time of the accident some one shouted to the plaintiff to put on the belt; that he took it off the peg, placed it around the pulley, kept it steady with his hands until it was placed on the pulley above, and that it then started to run; that when it started to run, he stood up and turned to his work; that when he had so turned, his right side was toward the pulley; that the belt came off above, fell down on the two-by-six board, and the pulley below; that the slack wrapped around the lower pulley, the belt jerked the two-by-six board from its place, tore the upper floor, struck plaintiff on the right side, threw him across the platform, and nearly into the fire holes. The platform and sawdust conveyors were also torn and shattered. Plaintiff's injuries were of a serious and permanent character. His right foot was crushed, the bones of his right leg were broken in several places, several ribs and his lower jaw were broken, and his flesh was much bruised on the right side of his body. Some of the above-stated facts were denied and disputed by the defendant's evidence, but we have stated facts which appear in evidence.

The complaint alleges that the accident occurred a few days after the plaintiff began to work at that place; that he was unacquainted with the construction of the mill machinery; that his duties as fireman absorbed his whole attention; and that he had neither time nor opportunity to examine or observe the working or manner of construction of said machinery. He charges the defendant with negligence in not providing safeguards for the belt and pulleys. He also alleges that the conveyor which was operated by the belt was heavy and cumbersome, and that the belt and pulley were insufficient to operate the conveyor when it was heavily loaded, by reason of which the belt was thrown from the pulley; that this condition had existed for several months prior to the accident, was well known to the defendant, and unknown to the plaintiff. The defendant denied negligence on its part and affirmatively pleaded the defenses of assumption of the

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risk, fellow servant, and contributory negligence. The cause was tried before a jury and resulted in a verdict for plaintiff in the sum of \$5,000. The defendant moved for a new trial, which was denied. Judgment was entered for the amount of the verdict, and the defendant has appealed.

It is assigned that the court erred in refusing to give certain instructions requested by appellant. They were to the effect that appellant was not an insurer of the safety and sufficiency of the appliances employed by it; that it was required to take such reasonable precautions only as would have been observed by a reasonably prudent man under the circumstances, and was not required to anticipate any accidental happenings which would not have been suggested by reasonable and ordinary experience. It is doubtful to our minds whether there was evidence in this case upon which to base the requested instructions on the theory that the accident in question was a merely accidental happening that would not have been suggested as a probable one by reasonable and ordinary experience. In any event, however, the court did instruct the jury that appellant was not an insurer of the safety of its employees, but that the law requires that it shall furnish a reasonably safe place to work, under all the circumstances of the employment, and that it shall exercise such care for the safety of its employees as an ordinarily careful and prudent person, having in view the dangers to human life and limb, would exercise under like circumstances. We think the above covered appellant's point.

It is argued that the court erred in refusing to give the following requested instruction:

"The court instructs the jury that there is no law in the state of Washington, applicable to this case, which requires of the defendant the use of any specific or definite appliances or devices for the guarding of the belt or the pulley involved in this case; that the law only requires that the defendant should exercise reasonable prudence and care in providing safeguards. That no safeguards are required by law against

dangers which would not suggest themselves to a reasonably prudent, careful and cautious man."

It is appellant's theory that the complaint does not bring this case within the operation of the act of 1903 requiring the maintenance of certain safeguards, and that it must be considered as a common-law action and not one under the statute. The jury were not advised by the instructions of the existence of any statute upon the subject, but the case was submitted upon instructions as to ordinary and reasonable care and prudence on the theory of the common law. We do not see that appellant has reason to complain in this particular, even under its own theory as to nonapplicability of the factory act.

It is next assigned that the court erred in giving the following instruction:

"Now, there is another feature of this case I will call attention to. An employee who is employed to do a certain kind of work may be called upon by his employer to do something out of the line of his ordinary duty. If that work that is outside of the line of his duty is dangerous in its nature, inherently dangerous, it is incumbent upon the employer to inform the employee of such danger and warn him of such danger before he sets him at such work; but if the danger is apparent, open and plain, such that an ordinarily sensible person would perceive by the exercise of his senses, then such warning is not necessary, because it is something he can see himself. If I am sent about a piece of work and told to go to a certain place and there is a hole in the floor six foot square, my employer is not bound to tell me that; I have eyes and must use them and not walk off into that hole."

The objection to this instruction is that it introduces an element not within the issues, viz., that of a servant being called away from his regular duties to some other place without sufficient warning as to probable danger. It appears that both parties submitted written requests for instructions, but the court instructed orally in his own language. The criticism upon the quoted instruction presents some difficulty,

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but we believe, in view of the whole case, it should not be held to have constituted prejudicial error. The complaint and evidence both show that respondent's ordinary duties were those of fireman, and that he was usually busy feeding the ovens. It is true he had frequently adjusted this belt upon the lower pulley, but it was sometimes done by the engineer. His regular duty was elsewhere, and his calls to this place were necessarily sudden and in a measure unexpected. The complaint also alleges that, by reason of defective machinery, which was unknown to him, and without warning or notice to him, the belt fell and caused the injury.

Considering the short time he had been there, and all the evidence in connection with the above averments, we think it should be held that this instruction as to the law when one is called from his ordinary duty, and as to the duty to warn him, was sufficiently within the issues. Particularly do we think it was not prejudicial in view of the latter part of the instruction with reference to open, plain and obvious conditions. Furthermore, the evidence of respondent, and the only other witness who saw him at the time of the accident, was that respondent had turned from the place of the pulley when the machinery had started to run, and was going to his regular place, when he was struck. His presence at the place was due to his having been called to that locality, and he received no warning of the impending danger. When evidence is received without objection upon any particular ground not covered by the complaint, the court may assume that the complaint is as broad as the evidence when charging the jury, and the complaint will be deemed amended to conform with the evidence and charge, since the amendment could have been made as of course at the trial. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202.

It is argued that the court erred in not stating to the jury that appellant had made issue with the complaint by denials in its answer. It is true the court did not specifically so

state; but the jury must have understood from the whole trial that appellant controverted the material facts alleged by respondent, and the court did instruct that the burden was upon respondent to prove all the allegations of his complaint by a fair preponderance of the evidence. Under these circumstances appellant was not prejudiced by the mere failure of the court to state that the material allegations of the complaint were denied.

It is further urged that the court erred in stating to the jury that there were but two affirmative defenses, viz., contributory negligence and assumption of the risk. The answer also interposed the defense that the accident was caused by the negligence of a fellow servant, but the court said nothing of this to the jury and gave no instruction upon the subject. Appellant does not appear to have requested an instruction on this subject, but if the subject came within the evidence it became the duty of the court to state the law thereon to the jury. The only basis for the claim that the act of a fellow servant caused the accident is that the foreman of the mill, who was upon the upper floor, testified that the block piler, against the foreman's orders given at the time, attempted to put the belt upon the upper pulley, and that because of his inexperience it fell. The engineer also testified that the block piler was attempting to put on the belt when he left to go below, by order of the foreman, to put on the belt below. The foreman expressed his theory that the accident was due to the fact that respondent must have been holding the belt against the pulley, but he did not see what occurred below, and respondent and the engineer, who had reached the lower floor, were the only eyewitnesses of what occurred. They both say that the respondent had adjusted the belt, that the machinery had commenced to run, and that respondent had turned to go to his work when the belt fell. This testimony from the only eyewitness of respondent's situation at the moment of the accident shows that respondent was going to his ordinary duties, and was

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at the time doing nothing in common with the block piler. He could not see what was going on above. The conditions which brought about his injury were not under his control, and manifestly the situation should not have been such that the mere dropping of the belt would have wrought such havoc. The belt was liable to drop from the hands of anyone, experienced or otherwise. The real proximate cause of the accident was not, therefore, traceable to the act of the block piler, even if that act may have set other agencies in motion; but it must have been due to some defect in the appliances. Under the facts in evidence there was no question of fellow servant involved.

In *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814, it was held that a fire knocker, at work in a cinder pit beneath an engine, was not a fellow servant with a co-employee who moved another engine over the pit; but that he was entitled to a reasonably safe place for his work. The same was true of respondent. While in the act of pursuing his regular duties, he was assailed by the flying belt and crashing timbers. The place was therefore not reasonably safe, even under appellant's theory as to the act of a fellow workman. The appliances should not have been such that the mere act of the block piler in dropping the belt would have produced such a result. In view of the evidence, it was therefore not error to fail to state that the answer included the defense that the accident was due to the act of a fellow servant.

Insufficiency of the evidence, failure of proof, and that the complaint does not state a cause of action are all urged. From the statement of the evidence and pleadings and from what has been hereinbefore said, we think it is sufficiently clear that the court did not err in overruling these contentions.

The judgment is affirmed.

MOUNT, C. J., DUNBAR, RUDKIN, and FULLERTON, JJ.,
concur.

ROOT and CROW, JJ., took no part.

[No. 6308. Decided November 20, 1906.]

CARSTENS & EARLES, *Cross-Appellant and Respondent*, v.
W. D. HOFIUS, *Appellant*, and WITTLER-CORBIN
MACHINERY COMPANY, *Respondent*.¹

CORPORATIONS—CONVEYANCES—SELLING OUT TO ANOTHER CORPORATION—CREDITORS—LIABILITY OF TRUSTEE OF SELLING CORPORATION. Where a corporation sells all of its assets to a corporation newly organized by part of the trustees, which assumed the old indebtedness, the balance of the consideration passing directly to the trustees and for their benefit, a trustee who participated therein and received benefits from the transaction is liable to the creditors of the corporation, under Bal. Code, § 4265.

SAME. The fact that the new corporation assumed the indebtedness of the other, does not relieve the trustee from liability to a creditor who had no notice of the transaction.

CORPORATIONS—SALE OF ASSETS TO NEW CORPORATION—RIGHTS OF CREDITORS. Where a corporation is organized to take over the business and all the assets of another corporation, which it purchases, paying over the consideration directly to and for the benefit of the trustees, knowing that the selling corporation is unable to pay its creditors, the new corporation is liable for the debts of the other, although it is not alleged that it assumed to pay the same; since the assets were a trust fund for creditors, as to whom the transaction was fraudulent.

Cross-appeals from a judgment of the superior court for King county, Honorable Walter A. McClure, judge *pro tempore*, entered February 24, 1906, in favor of the defendant, after sustaining a demurrer to the complaint, in an action to recover upon promissory notes after the improper disposition of the assets of a corporation. Affirmed in part and reversed in part.

Ballinger, Ronald, Battle & Tennant, for appellant.

J. B. Alexander, for respondent.

HADLEY, J.—This action was brought to recover by reason of an alleged improper disposition of the assets of a cor-

¹Reported in 87 Pac. 631.

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poration. The plaintiff and the defendants Corbin Machinery and Wittler-Corbin Machinery Company are corporations. In January, 1902, the Corbin Machinery Company became indebted to plaintiff corporation in the sum of \$406.73, and in December, 1902, the indebtedness being unpaid, the defendants Corbin Machinery Company and W. J. Corbin executed promissory notes to plaintiff for the amount of said previously existing indebtedness. The notes being unpaid, the plaintiff, in January, 1905, obtained judgment against the said makers, and thereafter execution was issued thereon, which was returned wholly unsatisfied. When the indebtedness was incurred, the defendants Corbin and Hofius were owners of capital stock in said Corbin Machinery Company, and were also trustees thereof. On July 8, 1902, Hofius resigned as trustee and was succeeded by one Wittler.

In June, 1902, the Wittler-Corbin Machinery Company was organized, and the said Corbin and Wittler became stockholders and trustees therein. In the same month the trustees of the Corbin Machinery Company and the trustees of the Wittler-Corbin Machinery Company made an agreement whereby the former corporation agreed to sell to the latter one all the property of the Corbin Machinery Company, except one certain contract with Perkins & Company of Grand Rapids, Michigan, the sale to include the good will of the Corbin Machinery Company. It was also agreed that, as part of the purchase price and consideration to be paid, the purchasing corporation should assume and pay all the outstanding obligations of the selling corporation, excepting a certain promissory note for \$10,000 owing to the defendants Hofius and Pigott; that the difference between the appraised or inventory value of the property so purchased and the total of said outstanding obligations should be paid by the issuance of stock in the Wittler-Corbin Machinery Company to defendant Corbin or to such persons as he should direct, it having been previously agreed between Corbin, Hofius and

Pigott that the two latter should sell to the former all their stock in the Corbin Machinery Company. In pursuance of said agreement, the two defendant corporations carried it into effect through the passage of resolutions by their respective boards of trustees, the stockholders consenting therein.

At the time of the sale it appeared from the statements and inventories of the Corbin Machinery Company, and it was estimated by the parties to the sale, that the reasonable value of the property, including the good will of the selling company, was \$27,500, over and above all the outstanding indebtedness of the selling company, except the \$10,000 note mentioned. At about the time of the sale, the Whittler-Corbin Machinery Company issued to defendant Corbin certificates for its capital stock to the amount of \$20,000, par value, and all the property of the selling corporation was transferred to the purchasing one, except the single contract mentioned. The purchasing corporation continued the business formerly conducted by the selling one, and thereafter exercised complete ownership and control over the property and business formerly owned and conducted by the selling corporation.

The capital stock of the purchasing corporation was \$40,000, divided into four hundred shares of \$100 each. Defendant Corbin became a subscriber for two hundred shares of said stock, and said Wittler subscribed for the remaining two hundred shares. Corbin had purchased the stock of Hofius and Pigott in the selling corporation, and as such stockholder his entire equity in the assets sold was accepted as the consideration and payment by him for his subscription for the two hundred shares in the purchasing corporation. Wittler, the other subscriber, paid \$12,500 cash for his two hundred shares. The purchasing corporation paid all the outstanding obligations of the selling one, except the claim of the plaintiff and the \$10,000 note above mentioned. Plain-

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tiff's claim was not presented to the purchasing corporation, but was presented to Corbin, who was at the time the president of the selling company, and thereupon the notes aforesaid, representing the previously existing indebtedness to plaintiff, were executed by the selling corporation and Corbin. The plaintiff had no knowledge of the agreement for the sale and transfer of the assets of the selling corporation until after the giving of said notes, and it had no knowledge, at the time of the commencement of this action, of the agreement of the purchasing company to pay the indebtedness of the selling one.

Prior to the agreement for the sale, the selling corporation was indebted to Hofius and Pigott in the sum of \$10,000, evidenced by its promissory note. It was agreed between Hofius, Pigott and Corbin that the stock of Hofius and Pigott in the selling corporation should be purchased by Corbin, but that the said stock should be held by Hofius and Pigott as collateral for the payment of the said \$10,000 note, the payment of which Corbin guaranteed. Prior to the sale \$750 had been paid upon the note, leaving a balance of \$9,250. At about the time of the sale, it was agreed that Corbin should pay Hofius and Pigott \$2,250 cash upon the note, and should execute to them his note for \$7,000, which latter note should be secured by depositing with Hofius and Pigott \$17,000 of Corbin's stock in the purchasing corporation. Thereupon Corbin hypothecated \$3,000 of his stock in the purchasing corporation to Wittler, and borrowed thereon \$2,250, which sum he paid to Hofius and Pigott, and he executed his note for \$7,000 secured by \$17,000 of stock in the purchasing corporation, as aforesaid, the old \$10,000 note held by Hofius and Pigott being then surrendered. Afterwards the stock of the purchasing corporation so pledged by Corbin was sold to satisfy said loans, and after applying the proceeds of the sale to the payment of the loans, there was left a balance of \$1,200.

Neither Hofius nor Pigott became a purchaser of the stock at the said sale thereof, and neither one has ever been the owner of any part of the stock of the Wittler-Corbin Machinery Company. No money was paid by the Wittler-Corbin Machinery Company to the Corbin Machinery Company for the transfer of the latter's assets. No consideration passed to it for the transfer other than the assumption by the Wittler-Corbin Machinery Company of the outstanding indebtedness of the other company, not including the said \$10,000 debt owing to Hofius and Pigott. The remaining consideration was paid by means of the issue of fully paid up stock of the Wittler-Corbin Machinery Company to Corbin, of the par value of \$20,000. At the time of the transfer of the assets of the Corbin Machinery Company, defendant Pigott was not a trustee of said company, but at the time the sale was authorized the defendant Hofius was a trustee, was present at the trustee's meeting, consented to the plan for the transfer and to the resolution authorizing it, and did not cause his dissent therefrom to be entered at large upon the minutes of the board of trustees.

The above facts we have gleaned from the court's findings in the case. The findings are very extensive, and the above is but an abbreviated statement thereof. There is no evidence here, and the findings are therefore conclusive as to the facts. The complaint, after setting forth some of the above facts together with other allegations, asks, among other things, for judgment for the amount of plaintiff's claim against both defendant corporations, and also against Corbin, Hofius and Pigott. The defendants Corbin Machinery Company and Corbin made default, and the defendants Wittler-Corbin Machinery Company and Hofius demurred to the complaint; the demurrer of the former being sustained, and the latter overruled. Defendant Hofius answered and, after a trial, judgment was awarded against the two defaulting defendants, and also against Hofius. Judgment was granted in favor of the defendants Wittler-Corbin Machinery

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Company and Pigott. The defendant Hofius has appealed from the judgment against him, and the plaintiff has appealed from the judgment in favor of the Wittler-Corbin Machinery Company.

With respect to the appeal of appellant Hofius, we think it is manifest from the foregoing statement of facts that he shared the fruits of the transfer of the assets from the Corbin Machinery Company to the Wittler-Corbin Machinery Company. At the time the transfer was consummated he was a trustee of the selling corporation. The method pursued was a circuitous one for disposing of his stock in the Corbin Machinery Company and for realizing therefor, from the consideration paid for the corporate property, the value of his stock. He either participated directly in the distribution of the consideration which should have passed directly to the selling corporation or he sold his stock in said corporation to Corbin and took a lien upon \$17,000 of the stock of the purchasing corporation, which was a part of the consideration for the transfer of the selling corporation's assets. Either view, it seems to us, necessarily leads to the same result.

After the transfer of its property, the selling corporation had nothing left except a certain contract the value of which does not appear. The consideration paid, as we have seen, passed into the control of others and not to the selling corporation. That said corporation was deprived of the means of paying its debts is shown by the failure of the respondent, the plaintiff below, to recover upon execution against the corporation. Under such circumstances we think appellant Hofius, as a trustee participating in the transaction, became liable to the creditors of the corporation under § 4265, Bal. Code, as said section was construed and applied by this court in *Tacoma Ledger Co. v. Western Home Bldg. Ass'n.*, 37 Wash. 467, 79 Pac. 992.

It is argued by appellant that in that case no provision was made for the assumption of the debts of the selling corpora-

tion, as was done in the case at bar. At the time this action was commenced the respondent did not know that the purchasing corporation had assumed the payment of the indebtedness, and it was not bound to know it, since the record thereof was a private one made by the two corporations, and was in no sense a public record. In *Hibernia Ins. Co. v. St. Louis etc. Transp. Co.*, 13 Fed. 516, the court said:

"Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market."

No more will equity require a creditor to waive his right to recover upon the obligation of a trustee who has permitted all the tangible assets of a corporation to be absorbed by another, in the proceeds of which he has shared, and run his chances of recovering from the other, merely because such other corporation may have assumed to pay the debts of the one whose assets have vanished, to the extent, at least, of being unavailable to creditors. Particularly is this true when the creditor for a long time has no knowledge of the transfer of the tangible property of the debtor corporation, and at no time before suit has knowledge that the other one has assumed the payment of its vendor's debts, as was true of the respondent here. We therefore think the court did not err in entering judgment against appellant Hofius.

Appellant Carstens & Earles, plaintiff below, assigns as error that the court sustained the demurrer to the complaint interposed by the Wittler-Corbin Machinery Company. By its demurrer the said corporation admits the averments of the complaint, that it purchased the assets of the Corbin Machinery Company, that the latter company ceased to conduct an active business, that the consideration paid for the property did not pass to the selling corporation, but did go directly to its trustees and for their benefit, that the selling corporation was unable to pay its indebtedness to this cross-

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appellant, that all these facts were known to it at the time of the transfer, and that the fact of the transfer was not known to this cross-appellant.

This court has held, beginning with *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, and followed by a number of other decisions, that the assets of an insolvent corporation constitute a trust fund for the benefit of its creditors, and that no subterfuge will be permitted to prevent a distribution of such funds among the creditors. The demurrer admits that the Wittler-Corbin Machinery Company was organized with the purpose of acquiring the assets of the other corporation by paying over the consideration, not to the selling company, but directly to and for the benefit of the latter's trustees. By the averments of the complaint, the Wittler-Corbin Machinery Company therefore knowingly became a party to a scheme by which both the assets of the Corbin Machinery Company and the proceeds thereof were rendered unavailable to the latter's creditors. In such case the transfer may be set aside as fraudulent, the property subjected to the satisfaction of creditor's claims, or the grantee or transferee held liable for its value.

"If a corporation conveys or transfers its property, real or personal, to an individual or another corporation, with intent to hinder, delay or defraud creditors, or without consideration, existing creditors may sue in equity, after recovery of judgment and return of an execution thereon unsatisfied or, under some circumstances, without this, to set the conveyance or transfer aside as fraudulent, and to subject the property to the satisfaction of their claims, or to hold the grantee or transferee liable for its value." 3 Clark & Marshall, Private Corporations, § 777a.

See, also, cases there cited.

We therefore think the complaint states a cause of action against the Wittler-Corbin Machinery Company, and that the court erred in sustaining the demurrer. The record presents the anomaly of a finding by the court that the Wittler-Corbin Machinery Company assumed the payment of debts

of the other company which included this cross-appellant's claim, and yet no judgment was awarded against it. The finding was made, however, upon a trial of the issue made by appellant Hofius. The complaint did not allege that the debts were assumed by the respondent Wittler-Corbin Machinery Company, and the appeal now under discussion involves the demurrer to the complaint alone. Treating it as standing alone, and without reference to the court's finding on the trial of the issue made by appellant Hofius, we nevertheless find, for the reasons assigned, that it states a cause of action.

The judgment against appellant Hofius is affirmed, but that part of the judgment which is in favor of the Wittler-Corbin Machinery Company is reversed, and the cause is remanded with instructions to vacate that part of the judgment and overrule the demurrer to the complaint. The respondent and cross-appellant, Carstens & Earles, shall recover its costs on both appeals.

MOUNT, C. J., FULLERTON, RUDKIN, DUNBAR, and CROW, JJ., concur.

[No. 6347. Decided November 21, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES ROURK,
Appellant.¹

APPEAL—RECORD—STATEMENT OF FACTS—EXCEPTIONS TO INSTRUCTIONS. In the absence of a bill of exceptions or statement of facts showing all the instructions, and of any exceptions to the instructions given, error in instructions cannot be reviewed.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered February 17, 1906, upon a trial and conviction of the crime of cattle stealing. Appeal dismissed.

¹Reported in 87 Pac. 507.

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Statement of Case.

Sayre & Brinker, for appellant.

C. D. Sutton (*Thomas Stevenson*, of counsel), for respondent.

PER CURIAM.—This appeal is taken from a judgment of conviction for the crime of cattle stealing. Judgment was entered on the 17th day of February, 1906. Notice of appeal was served and filed on March 20, 1906. No statement of facts has ever been served or filed, but long after the time had expired for filing a statement of facts, an effort was made to obtain an order extending the time for filing such statement, but the order was denied.

The only errors assigned are directed to the instructions which were given by the court to the jury upon the trial. The transcript contains what purports to be instructions given upon the trial. But it does not appear that these were the only instructions given by the court, or that any exceptions were taken to any of them. Under such circumstances, we cannot consider the questions presented. The appeal must, therefore, be dismissed.

[No. 6144. Decided November 21, 1906.]

W. MOELLER, *Respondent*, v. MATT H. GORMLEY, *as*
Treasurer of King County, Appellant.¹

TAXATION—LEASE OF TIDE LANDS FROM STATE—RIGHT TO TAX. A leasehold interest in tide lands, under lease from the state, is subject to taxation.

SAME—ASSESSMENT—REAL OR PERSONAL PROPERTY. A leasehold interest in state tide lands is assessable for taxation as real, and not as personal property, although the present revenue law may be inadequate to enforce its collection when so assessed.

Appeal from a judgment of the superior court for King county, Yakey, J., entered January 29, 1906, upon over-

¹Reported in 87 Pac. 507.

ruling a demurrer to the complaint, dismissing an action to enjoin the collection of taxes. Affirmed.

Kenneth Mackintosh and R. W. Prigmore, for appellant. Leasehold or possessory interests in state lands are taxable. Const., art. 7, §§ 1, 2; *Pierce's Code*, §§ 8591, 8595, 8634 (Bal. Code, §§ 1655, 1698); *Washington Iron Works v. King County*, 20 Wash. 150, 54 Pac. 1004; *Commercial Elec. Light & Power Co. v. Judson*, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, 63 Pac. 1123; *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54; *Carrington v. People*, 195 Ill. 484, 63 N. E. 163, *Harvey Coal & Coke Co. v. Dillon*, 54 W. Va. 605, 53 S. E. 928; *Mayor v. Los Angeles City Water Works Co.*, 49 Cal. 638; *Wilgus v. Commonwealth*, 9 Bush (Ky.), 556; *State v. Tucker*, 38 Neb. 56, 56 N. W. 718; *People v. Frisbie*, 31 Cal. 146; *People v. Cohen*, 31 Cal. 210; *People v. Shearer*, 30 Cal. 645. It is immaterial whether such interest was assessed as real or personal property. *State ex rel. Ashland Water Co. v. Wharton*, 115 Wis. 457, 91 N. W. 976; *Wells v. Savannah*, 87 Ga. 397, 13 S. E. 442; *State v. Frost*, 25 Wash. 134, 64 Pac. 902; *Washington Iron Works v. King County*, *supra*; *Eureka District Gold Mining Co. v. Ferry County*, 28 Wash. 250, 68 Pac. 727. Such leasehold interests are assessable as personal property. 18 Am. & Eng. Ency. Law (2d ed.), 710; *Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473; *Jeffers v. Easton, Eldridge & Co.*, 113 Cal. 345, 45 Pac. 680; *Wilgus v. Commonwealth*, and *Harvey Coal & Coke Co. v. Dillon*, *supra*.

E. H. Guie, for respondent, to the point that the interest was not subject to taxation, cited: 7 Am. & Eng. Ency. Law (2d ed.), p. 368; Cooley, Taxation, p. 172; *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. 99; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *Edgerton v. Huntington*

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School Township, 126 Ind. 261, 26 N. E. 156; *People v. Trustees of Schools*, 118 Ill. 52, 7 N. E. 262; *Page v. Pierce County*, 25 Wash. 6, 64 Pac. 801; *Washington Iron Works v. King County*, 20 Wash. 150, 54 Pac. 1004. Leasehold estates when taxable must be taxed as realty. *Reilley v. Anderson*, 33 Wash. 58, 73 Pac. 799; *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; *Sanford v. Johnson*, 24 Minn. 172; *McKee v. Howe*, 17 Colo. 538, 31 Pac. 115.

Root, J.—In 1899 plaintiff leased from the state of Washington, for a period of thirty years, certain Seattle tide lands. Thereafter the assessor of King county caused the leasehold interest of respondent in said tide lands to be assessed as personal property, and the tax was accordingly levied against such leasehold interest, and entered upon the personal tax rolls of the county for the year 1904. This action was instituted for the purpose of enjoining and restraining appellant from collecting said taxes. A demurrer to the complaint was overruled by the court. Appellant electing to stand upon his demurrer, and refusing to plead further, judgment was entered dismissing the action. From this judgment the present appeal is taken.

Two questions are presented: (1) Is such leasehold interest taxable? (2) If taxable, should it be assessed as realty or personal property? Under a constitution such as ours, it is the general rule that all property other than public is assessable, and before any exception can be allowed there must be found unequivocal authority therefor. But the converse of this rule is applicable to public property. Before any property belonging to the state can be subjected to taxation, clear and unmistakable authority therefor must be made to appear. It is contended by respondent herein that to impose a tax upon this leasehold, while nominally asserting taxation against the property of an individual, would practically and actually amount to the levying and enforcement of a tax

against the state; that as tide lands of this character are leased for a term of years to the highest bidder, it must be presumed that the state obtains the full rental value for the use of these lands; that this being true, it naturally follows that the amount of rental obtainable from any person willing to pay the full rental value of said lands would be increased or decreased to the extent of the tax imposed accordingly as he should be, or not be, required to make payment thereof; that the assessment falls upon the right to use the property; that is a right which is vested in the state, but which the state during a given period permits the individual to exercise: that in its last analysis, such taxation is upon the property of the state, and consequently not permissible under § 2 of art. 7 of the state constitution, which reads as follows:

“ . . . That the property of the United States and of the state, counties, and school districts, and other municipal corporations, . . . shall be exempt from taxation.”

This argument is plausible, and the proposition advanced appears sound as a theory. But we think it cannot, under the general scheme and purpose of taxation, successfully bear the test of practical application. Doubtless a prospective lessee would bid more for a lease if he knew that his leasehold interest would not be taxed. But the same may be said of a prospective purchaser of state lands. He would pay more for the fee if he knew it would remain exempt from taxation. The difference between the two is in degree only, and not in character. But it is the policy of our commonwealth that the fee in any real estate sold by the state shall thenceforth be assessable. As soon as title passes from the state the land becomes private, and no longer public, property. When a lease is given by the state to an individual or private corporation, the lessee thereby obtains for his or its private use certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, abso-

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lute dominion and ownership within the limitations of his or its lease. Why, as such property, it should not be subject to the general rule of taxation, we conceive of no reason.

It is urged, however, that such a leasehold interest, if taxable at all, should be assessed as real estate instead of personal property. This was evidently the view entertained by the trial court, and we think it correct. The revenue statute, defining real estate for the purpose of taxation, is as follows:

"Real property for the purposes of taxation shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures and improvements, or other fixtures of whatsoever kind, thereon, and all rights and privileges thereto belonging, or in anywise appertaining," Bal. Code, § 1656 (P. C. § 8592).

This court, in line with others, has held that a leasehold for a term of years was an "interest in lands." *Reiley v. Anderson*, 33 Wash. 58, 73 Pac. 799; *Chicago Attachment Co. v. Davis Sewing Mach. Co.*, 142 Ill. 171, 31 N. E. 438; *Sanford v. Johnson*, 24 Minn. 172; *McKee v. Howe*, 17 Colo. 538, 31 Pac. 115.

It would seem that the expression in the statute "all rights and privileges thereto belonging" would clearly cover a leasehold interest such as we have here. Appellant points out that the present revenue law is inadequate to enforce the collection of the taxes levied—especially those assessed during the last three or five years of the lease—if the leasehold be taxed as real estate. We are impressed with the force of this suggestion, and doubt not that the legislature will give the matter appropriate attention if it be called to its attention. This court, however, must pass upon the statute as it is found, without importing, by way of construction, elements now wanting.

The judgment of the trial court is affirmed.

MOUNT, C. J., DUNBAR, CROW, HADLEY, and FULLERTON,
JJ., concur.

RUDKIN, J., concurs in the result.

[No. 6475. Decided November 22, 1906.]

F. W. COMRADE, *Respondent*, v. ATLAS LUMBER & SHINGLE
COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SAW FILER BY STARTING SAW—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY. A saw filer, who had a right to rely upon a signal for the starting of a mill, is not guilty of contributory negligence, as a matter of law, but the question is for the jury, where he was injured by the starting of the mill without warning, and the evidence is conflicting as to whether he assumed a dangerous position in doing the work or should have released the belt tightener before commencing work.

SAME—FELLOW SERVANTS—WARNING OF STARTING MACHINERY. An engineer whose duty it is to give a warning by two blasts of the whistle before starting the machinery in a mill, so that employees may get out of danger, is not a fellow servant of a saw filer engaged in filing saws during the noon hour; since the giving of such warning was one of the nondelegable duties of the master.

DAMAGES—EXCESSIVE VERDICT—APPEAL—REVIEW—REDUCTION. A verdict for \$2,500, reduced by the trial court to \$1,500, is still excessive and will be further reduced by the supreme court to the sum of \$1,000, where the plaintiff was not permanently injured, was in the hospital but two weeks, suffered for a short time thereafter, and within a short time was at work earning an advance of \$2 per day over his previous employment.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 9, 1905, in favor of the plaintiff, in an action for personal injuries sustained by a saw filer by the negligent starting of a saw. Affirmed on condition of remitting \$500.

Bausman & Kelleher and *R. P. Oldham*, for appellant.

John E. Humphries and *George B. Cole*, for respondent.

Crow, J.—This action was instituted by the plaintiff, Frank W. Comrade, against the defendant, Atlas Lumber & Shingle Company, a corporation, to recover damages for per-

¹Reported in 87 Pac. 517.

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sonal injuries. The plaintiff alleged, that he was employed by the defendant as a saw filer; that defendant agreed to refrain from operating or starting its mill while he was engaged in filing its saws; that on April 11, 1905, while plaintiff was so engaged, the defendant negligently allowed its mill to be started without giving him any warning or notice; and that plaintiff, while endeavoring to escape and release himself from the saw which had thus been placed in motion, was seriously injured. The defendant pleaded contributory negligence, assumption of risk, and negligence of a fellow servant. Upon the trial a verdict was returned in favor of plaintiff for \$2,250. Thereupon the defendant moved for a new trial on various grounds. This motion was denied on condition that plaintiff accept \$1,500 as damages, which he elected to do. Final judgment was thereupon entered for the latter sum, and the defendant has appealed.

The controlling contentions of the appellant under its numerous assignments of error are, (1) that the respondent was guilty of contributory negligence, and (2) that the negligence, if any, of which respondent complains, was that of a fellow servant. The evidence shows that the respondent's duties required him to file certain saws operated by appellant; that it was his usual custom to do this work at the noon hour, while the mill was idle; that one of these saws, about fifty-six inches in diameter, was attached to and operated by a shaft on which a pulley was located; that a belt about twelve inches in width extended from this pulley to another pulley upon the main shaft; that a tightener was provided for the belt; that from this tightener a cord with weights attached extended back some distance, for the purpose of more firmly holding the tightener against the belt and causing additional friction on the pulley; that when these weights were lifted, the friction caused thereby was removed from the belt, and that when the tightener was also raised substantially all friction was removed, and the saw would not run when the mill

was in operation. The respondent had lifted the weights, removing some friction from the belt, but had not raised the tightener so as to remove all friction. He had taken a position in front of the saw with one leg over or in front of it, and with the knee of his other leg against it, and being thus situated had proceeded with his work.

It was the duty of the engineer to give a signal by two blasts of a steam whistle before starting the mill, in order that all employees might be warned and thus avoid danger. While the respondent was employed and situated as above stated, the engineer, without giving the usual signal, started the mill. The friction created by the tightener upon the belt caused the saw to revolve, to catch and cut the clothing of the respondent, and make one or two slight abrasions upon his leg. The respondent, being unable to hold or stop the saw, and realizing himself to be in great danger, hastily made a violent and successful effort to tear himself loose from the saw. In doing this he was thrown, either by the force of the saw, or by his own muscular action, or by both combined, for a distance of some eight or ten feet, and falling on certain blocks of wood, was injured.

The appellant now contends that the respondent was guilty of contributory negligence, (1) in unnecessarily assuming a dangerous position relative to the saw while doing his work, and (2) in failing to release the tightener before commencing work. A number of experienced millmen and saw filers were presented as witnesses. Their evidence on these points was conflicting; some of them thought the respondent's position was a customary and proper one, while others thought it unnecessary, unusual, improper and dangerous. The witnesses were also in marked conflict when giving their testimony as to whether it was necessary and proper for the respondent to release the tightener before commencing work. Some said it should remain upon the belt to steady the saw while being filed; while others said it should have been removed to avoid

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danger. There is no question but that the respondent was entitled to rely upon the engineer to give the usual warning before starting the mill. Under all of these conditions and circumstances, and in view of this conflicting evidence, we cannot say, as a matter of law, that the respondent was guilty of contributory negligence. The presence or absence of such negligence upon his part was an issue of fact to be submitted to the jury, which was done under proper instructions given by the trial judge, and the verdict of the jury determined such issue in favor of the respondent.

The appellant requested the court to instruct the jury that the engineer was a fellow servant of the respondent, and that if he was negligent in failing to give the usual warning before starting the mill, the appellant was not responsible, such negligence being the act of respondent's fellow servant; and appellant now contends that the trial court erred in refusing such requested instruction. We are not prepared to say that the engineer would, under no circumstances, be a fellow servant of respondent and other employees in the mill. Under the facts here disclosed, however, we do hold that, in the matter of giving some proper warning before starting the mill, he was a vice principal of the appellant and not a fellow servant of the respondent. It was the duty of the appellant to provide the respondent with a reasonably safe place in which to work. The evidence shows that the respondent was expected to do his work of filing this saw during the noon hour, while the mill was not running. The appellant knew that its servants might be in such situations and positions relative to the machinery while the mill was not running as to subject them to great hazard and danger should it be suddenly started without notice to them. It was customary for the appellant, by its engineer, to give a signal by two blasts of a steam whistle shortly before starting the mill, and in fact it was its duty to give some such warning so that its employees might remove themselves from positions of danger in which they

might happen to be placed. In giving this warning, the engineer was performing a nondelegable duty of the master, thus discharging the duties of its vice principal. This being true, his negligence was that of the master. No evidence was offered by the appellant showing or tending to show that any warning was given. In fact, the undisputed evidence is to the contrary. We might reasonably assume that the respondent would not have been injured had the engineer performed his duty, for the respondent would then have been afforded ample time within which to remove himself from his position of danger before the machinery was placed in motion. We think the views here expressed are in strict harmony with the previous rulings of this court. *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *O'Brien v. Page Lum. Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lum. Co.*, 40 Wash. 276, 82 Pac. 273.

We have carefully examined the instructions given, and also those refused, and in view of the principles above announced, conclude that no prejudicial error has been committed in the matter of instructions, but that the law was fairly and properly stated to the jury.

The appellant vigorously insists that, although the damages awarded by the jury were reduced by the trial judge, nevertheless the sum of \$1,500 for which the judgment was finally entered, is still excessive. While we would ordinarily feel much hesitancy in making a further reduction of damages, after one reduction had already been made by the trial judge, still we think this contention should be sustained. The evidence shows that the respondent was earning \$5 a day at the time of his injury; that he was confined to the hospital about two weeks; that within a short time thereafter, as soon as the mills, which had suspended, again commenced work, he returned to his usual employment of saw filer, receiving a compensation of \$7 per day. He complains that,

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by reason of the accident, he has been permanently injured, but at the time of the trial, which occurred about seven months after the accident, the court appointed two competent, experienced, disinterested physicians to examine the respondent and report upon his actual condition. The result of their examination was such as to show that he has in reality sustained no permanent injury, and that he was, at the time of their examination, in excellent physical condition. They found a slight defect in his nostrils and throat, creating a liability to occasional attacks of bleeding from the nose, but their testimony was that this condition could not have been caused by, or have resulted from, the injuries of which he complained. The daily record kept by the attendants and nurses during the period of two weeks that he was in the hospital shows that his statements as to his condition and the character of his injuries are not entirely in accordance with the facts. We fail to find that he has suffered any damage or injury other than a brief loss of time and perhaps some considerable suffering while he was in the hospital and for a very short period thereafter. We think the sum of \$1,000 sufficient damages to be awarded the respondent, our only doubt being whether that sum may not be excessive.

It is ordered that, if the respondent shall within thirty days after the filing of the remittitur, agree to accept damages in the sum of \$1,000, the judgment as thus modified be affirmed, otherwise that the judgment be reversed and a new trial be granted. The appellant will recover its costs on this appeal.

DUNBAR, FULLERTON, and HADLEY, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

and the following was entered upon the minutes of the council:

"On motion, petition granted, and streets and alleys committee and clerk were instructed to obtain title to the necessary right of way."

Thereafter, on March 7, 1906, the town council further considered the opening of the alley, and ordered the city attorney to begin condemnation proceedings against all property owners who had not agreed to deed to the city lands for the alley. The record of the city council is as follows:

"It was moved and seconded that W. B. Osbourn be instructed to institute condemnation proceedings against all of said property owners in proposed alley, that said streets and alleys committee are unable to arrange terms with."

This motion was carried by a unanimous vote by ayes and noes, by all members of the council except one, who was absent. Thereafter, on March 11, 1906, the city attorney brought an action in the name of the city to condemn the property necessary to complete the alley. The relators, having been served with summons, appeared and objected to the jurisdiction of the court, on the ground that the city had no power to exercise the right of eminent domain, and because the city had not authorized the proceedings by resolution or otherwise. These objections being overruled, a demurrer was filed substantially upon the same grounds. The demurrer being overruled, relators filed an answer denying all the allegations of the petition, and alleging the existence of an alley near the one sought to be condemned. At the trial evidence was introduced showing the necessity and public use for the alley. Findings and a judgment were entered accordingly, and a jury was ordered to assess the damages. The relators thereupon sued out this writ. Other facts necessary to an understanding of the questions involved will be stated hereafter.

It is first contended by the relators that the court was without jurisdiction, because the city had not passed an

ordinance or resolution establishing the alley, and it is claimed that the order of February 7 was neither an ordinance or a resolution. It is true that the order is not in form an ordinance, nor does it contain the word "Resolved," but it is nevertheless an order of the city adopted with all the formality required for the passage of an ordinance or a resolution. It is in effect a resolution. 21 Am. & Eng. Ency. Law (2d ed.), p. 947. A petition was filed, praying for the establishment of an alley, designating its location and size. Proper notice was given, and the city, upon motion, granted the petition. The statute gives cities of the fourth class power to establish and lay out alleys. Bal. Code, § 1011 (P. C. § 3523). There is no provision that such orders shall be by ordinance. A resolution or motion amounting to a resolution was therefore sufficient.

Relators next contend that the city was without power to condemn, because no procedure therefor has been provided. It is conceded that the act of 1893, Laws of 1893, page 135, provides that the procedure for condemnation by cities of the fourth class shall be in a manner provided by the act relating to the appropriation of land by corporations. But it is contended that this act is unconstitutional, because it is in substance an amendment of Bal. Code, § 1017 (P. C. § 3530), and does not set out the section as it would read as amended. But the act of 1893 is not, and does not purport to be, an amendment of any other section of the law. It is an independent act, and the criticism of the relators is therefore entirely without merit.

It is also contended that the act empowers cities to condemn for "public corporate uses," and that this clause does not include a street or alley to be used by the public, but only includes property sought to be used by the corporation itself, such as sites for fire engines, city halls and the like. But we are of the opinion that this clause means any public corporate use such as a city needs for the public or for it-

self, and includes streets and alleys within its borders necessary for the use of its inhabitants. It is also contended that the act has been superseded by subsequent legislation, but the acts referred to in the briefs as superseding the act in question have no reference to the act under consideration, but are amendments of sections of other acts entirely independent of this one.

It is next contended that the petition is not signed by a majority of the property owners in the district, and that this fact is jurisdictional. It seems that the principal use the petitioners desired for the alley was a sewer which was about to be constructed. The petition upon its face appears to include a majority of the owners of real estate in the proposed district. But, conceding that it does not, the city has authority to open alleys and streets for public use upon its own initiative without a petition therefor. The question presented is therefore not jurisdictional. The fact that the city may intend to use the alley for a public sewer or a street or other public use does not alter the power of the city to condemn.

It is next contended that the court erred in holding that it was not necessary for the city to show that there had been an attempt and failure to agree with the property owners upon the price to be paid for the land which the city desired for the alley. We held in *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215, that such fact is not a condition precedent to the institution of proceedings to condemn. Furthermore, the act under which this proceeding was maintained contained no requirement that there should be an attempt to agree. Bal. Code, § 1292 (P. C. § 5143).

It is contended that the court erred in holding that the necessity for the alley rested with the city council, and in excluding certain evidence offered by relators, to the effect that, at some prior time, certain persons had reserved for an alleyway portions of the block near the proposed alley, and

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that therefore there was no necessity for the proposed alley. The page of the record is not pointed out by the briefs where the court held that the question of necessity rested with the council, and we are unable to find that the court made such ruling. On the other hand the evidence in the record is conclusive that there was a necessity for the alley, and that the use was a public use, and the findings made by the court are that the contemplated use is a public use, and that the land sought is required and necessary.

When the relators offered certain evidence to the effect that the city had actually used for an alley a portion of the tract of land adjoining the proposed alley, a part of the length thereof, the court refused this evidence. This refusal was no doubt based upon the rule, laid down in *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, that the necessity to be shown is not an absolute necessity, but a reasonable necessity depending upon the circumstances of the case. For instance, if the city had theretofore used a crooked alley and desired it straightened for convenience of laying sewer pipe or water mains therein, or for the convenience of teams using the alley so that two teams at the same time might not enter in opposite directions and by reason of the narrowness of the alley become blocked therein, under such circumstances it could not be urged that there was no reasonable necessity for the alley to be made straight. We think the court did not err in rejecting the evidence offered, and finding there was a necessity for the alley as proposed.

The other questions presented need not be further discussed. We find no error in the record. The order made by the trial court is therefore affirmed.

DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.
CROW and ROOT, JJ., took no part.

[No. 6853. Decided November 23, 1906.]

CHRISTIAN RABEL *et al.*, Appellants, v. THE CITY OF SEATTLE
et al., Respondents.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENT FOR BENEFITS—LANDS LEASED FROM STATE. A leasehold interest in state lands is not subject to an assessment for local improvements made prior to the time of the letting of the land by the state; and the assessment, if made after the bidding for the lease, can only be levied upon the leasehold interest.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 15, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to restrain a city from enforcing an assessment for local improvements. Reversed.

Guie & Guie, for appellants.

Scott Calhoun and *O. B. Thorgrimson*, for respondents.

Root, J.—Appellants, as lessees from the state of Washington, filed their complaint in equity, asking for a permanent injunction to restrain the respondents from enforcing an assessment levied, or attempted to be levied, by the city of Seattle for municipal improvements alleged to be specially beneficial to the property leased by appellants, and to have said assessment stricken from the rolls. From a judgment in favor of respondents, this appeal is prosecuted.

On the 3d of October, 1904, the state leased certain state lands to one George James, who thereafter sold and transferred said lease and leasehold interest to appellants. The city council of Seattle, by an ordinance passed November 23 and approved November 24, 1903, provided for the improvement of Utah street, and for the payment therefor by the mode of "immediate payment," under the provisions of a

¹Reported in 87 Pac. 520.

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certain city ordinance. Under these proceedings an assessment was made, or sought to be made, upon the lots covered by appellants' lease. They contend that their leasehold interest in said lots is not subject to this tax, or to any assessment on account of local improvements.

The main question sought to be determined by the parties to this action is as to whether a leasehold interest in state lands can be assessed to pay for public improvements affording special benefits to the property leased or to be the leasehold interest in said property. Where local improvements are legally proposed by a municipality, subsequent to the bidding of a prospective leaseholder for the property covered by his lease, and such improvements when made constitute a special benefit to such leasehold interest, we believe that said interest can be subjected to an assessment to pay for the special benefits thus accruing. Before delivering a lease, all of the property in a given parcel of real estate belongs to the state; hence, at such time it is nonassessable for any purpose, unless clearly and expressly made so by the constitution or statute. When, however, any private individual or corporation acquires a leasehold of said property for a given period, the state ceases to be the owner of such interest during said time, but the lessee thereby becomes the owner of the rights accorded by the lease, and such rights are private property and assessable under the general rule of taxation. If the value of the right to the use of this property during, and by virtue of, the existence of the lease is specially enhanced by reason of a local improvement not contemplated and taken into consideration by the state at the time of accepting the lessee's bid for the lease, there would seem to be no reason in law or right why this interest should not be assessed as all other private property specially benefited by said improvement. But such an assessment must be limited to the leasehold interest, and not made against the interest retained by the state. *Richard v. Perrsdin*, 40 South. (La. Ann.) 789.

Where, however, the improvements are made, or their construction is regularly provided for, prior to the time of the bidding for the lease, we do not think that such improvements can be assessed against the leasehold interest. The effect of permitting such an assessment would be virtually to sanction a tax against the property of the state. If the state's property was about to be benefited by local improvements, it would be presumed that the additional value to be given such state property by such contemplated improvements would induce intending lessees to pay a higher rental than they otherwise would. If the bidder for a lease knew that local improvements were about to be made, but that the special benefits to be derived therefrom would be assessed upon the leasehold interest obtained from the state, it would have a tendency to deter him from bidding, or at least to induce him to bid less than he otherwise would. The effect would be to place the burden of the tax upon the state and doubtless, by reason of the uncertainty of the value of the improvements and the amount of special assessments, cause the state to lose more than the amount of the tax. For these reasons, in the absence of a statute expressly authorizing such a procedure, we do not think that an assessment made prior to the time the lease was bid for can be enforced against the interest of a lessee of state lands.

It appearing that the ordinance providing for the improvements, for the payment of which this assessment was sought to be levied, was passed prior to the issuance of the lease and presumably to the bidding therefor, and that the assessment purports to be made against the entire property instead of merely the leasehold, it follows that the judgment of the honorable superior court cannot be sustained. Said judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MOUNT, C. J., DUNBAR, and CROW, JJ., concur.

RUDKIN, J., concurs in the result.

FULLERTON and HADLEY, JJ., took no part.

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[No. 6325. Decided November 24, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. J. B. KNIFFEN,
Appellant.¹

BIGAMY—WITNESSES—COMPETENCY OF FIRST WIFE. Bigamy is not an offense committed by one spouse against another; hence the first wife is not a competent witness in a prosecution against the husband, under Bal. Code, § 5994 disqualifying a wife except in prosecutions for a crime committed by one spouse against another.

EVIDENCE—CERTIFIED COPIES FROM FOREIGN STATE—CERTIFICATE—SUFFICIENCY. The copy of the record of a marriage certificate of another state, not appertaining to any court, the record appearing to be the public record of a county, must be certified as required by U. S. Rev. Stat., § 906, to be admissible in evidence, and a certificate by a deputy clerk of such county to the effect that it was a true copy of the record in his office, under the seal of the county, is insufficient.

BIGAMY—DEFENSES—INVALIDITY OF FORMER MARRIAGE—BURDEN OF PROOF. In a prosecution for bigamy, the burden of proof is upon the defendant to show that the former marriage, proven by the state, was invalid by reason of the incompetence of the wife to enter into the relation.

Appeal from a judgment of the superior court for Klickitat county, McCredie, J., entered January 18, 1906, upon a trial and conviction of the crime of bigamy. Reversed.

W. B. Presby, for appellant.

E. C. Ward, for respondent.

MOUNT, C. J.—The appellant was convicted of the crime of bigamy. He alleges on this appeal that the court erred in permitting Nellie Kniffen, the alleged first wife of the appellant, to testify as a witness on the part of the state over his objection. The question is, whether the first wife, under the statute, is a competent witness against the accused

¹Reported in 87 Pac. 837.

on trial for the crime of bigamy. The statute reads as follows:

"The following persons shall not be examined as witnesses: (1) A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." Bal. Code, § 5994 (P. C. § 940).

It has been held, under similar statutes, in Iowa and Nebraska, that bigamy is a crime committed by one spouse against the other, and that therefore one was a competent witness against the other. *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *Hills v. State*, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155; *State v. Bennett*, 31 Iowa 24; *State v. Hazen*, 39 Iowa 648; *State v. Sloan*, 55 Iowa 217, 7 N. W. 516.

On the other hand, it has been held in Minnesota, Texas, Michigan, California, South Dakota, and by the supreme court of the United States, that such crimes are not committed by one spouse against the other, and therefore one spouse is incompetent as a witness against the other, under such statutes. *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762; *State v. Burt*, 17 S. D. 7, 94 N. W. 409; *People v. Langtree*, 64 Cal. 256, 30 Pac. 813; *People v. Quanstrom*, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723; *Overton v. The State*, 43 Tex. 617; *Compton v. State*, 13 Tex. App. 271, 44 Am. Rep. 703; *State v. Armstrong*, 4 Minn. 335.

In *Bassett v. United States*, *supra*, the supreme court of the United States considered the cases cited above from Minnesota, Texas, Iowa, and Nebraska, and concluded that a statute similar to our own was but an affirmation of the com-

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mon law rule, and that polygamy was a crime against the marriage relation, and not one committed by one spouse against the other. While much may be said in favor of the position that bigamy, adultery, and kindred crimes are committed by one spouse against the other, yet the weight of authority seems to be opposed to that rule. 30 Am. & Eng. Ency. Law (2d ed.), p. 956. We therefore feel bound to hold that in this case the court erred in permitting the first wife to testify against her accused husband.

Upon the trial the court received in evidence a marriage license and certificate of marriage from the state of Michigan, purporting to be a copy of the records of Bay county, Michigan, showing the marriage of Bert Kniffen and Mrs. Nellie Nickelson. This evidence was received over the objection of appellant that it was not competent because it was not certified as required by law. The certificate is as follows:

"State of Michigan, County of Bay, ss.

"I, H. Duffer, deputy clerk of said county of Bay, and clerk of the circuit court of said county, do hereby certify that I have compared the foregoing copy of the original record of marriage license and certificate of marriage with the original record thereof now remaining in my office, and that it is a true and correct transcript thereof and of said original record.

"In testimony whereof I have hereunto set my hand and affixed the seal of said county this second day of May, 1905.

"(Seal)

H. Duffer, Depty. Clerk."

The license and marriage certificate do not appear to be the record or proceeding of any court of the state of Michigan which, under Bal. Code, § 6040 (P. C. § 1018), may be authenticated by the clerk "or other officer having charge of the records of such court, with the seal of such court annexed." They appear to be a public record of Bay county, Michigan, not appertaining to a court, and must therefore be certified as required by § 906 of the Revised Statutes of the United States. *James v. James*, 35 Wash. 650, 77 Pac.

1080. It is true the officer making the certificate says therein that he is clerk of the circuit court of Bay county, Michigan. But he does not certify in that capacity, nor is the seal of such court annexed. He certifies as deputy clerk of Bay county, and attaches the seal of that county. The court therefore erred in receiving the evidence.

It is next argued that the court erred in refusing certain questions on cross-examination of the witness Nellie Kniffen. We have held above that this witness was disqualified to testify against her husband. It is therefore unnecessary to consider this assignment, because she cannot be permitted to testify on another trial.

The court instructed the jury in substance that, if they found that the accused and his first wife were married according to the laws of Michigan, it was not necessary for the prosecution to go farther and show that the wife was competent to enter into the marriage relation, and that there were no impediments to the marriage; that such facts would be presumed in the absence of proof to the contrary, and that the burden of showing the illegality of the marriage, or that the same was void, rested upon the accused. Appellant contends that these instructions were erroneous. In this class of cases the rule seems to be that the defendant must show all matters of confession and avoidance. 4 Am. & Eng. Ency. Law (2d ed), p. 45. The rule is stated in 5 Cyc., at page 700, as follows:

"The prosecution must prove a valid first marriage contracted by defendant and that the lawful spouse of defendant was living at the time the second marriage was contracted by him. Where the defense is that the first spouse was at the time of his or her marriage to defendant incapacitated to marry, because he or she was at that time a party to a valid marriage then subsisting, that marriage must be proved by defendant. The burden of proof also rests on him in all cases where he relies upon any statutory exception, or to rebut any presumption of the existence of the former spouse

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at the time of the second marriage, where such presumption has been raised by the evidence of the prosecution."

See authorities there cited. *Hoch v. People*, 219 Ill. 265, 76 N. E. 356. We think the instructions complained of were not erroneous.

For the errors above stated, the judgment is reversed and the cause remanded for a new trial.

Crow, Rudkin, Fullerton, and Hadley, JJ., concur.

[No. 6080. Decided November 24, 1906.]

ROSENA E. GROVER, *Respondent*, v. JAMES E. ZOOK,
Appellant.¹

BREACH OF MARRIAGE PROMISE—INCURABLE DISEASE AS DEFENSE—WHEN AGREEMENT NOT BINDING—PUBLIC POLICY. A marriage contract is void as against public policy where one of the parties is seriously afflicted with pulmonary tuberculosis and the other has a hereditary taint of such disease, even though the parties were aware of the facts prior to the engagement.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 21, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover damages for the breach of a contract of marriage. Reversed.

John E. Humphries, George B. Cole, and William E. Humphrey, for appellant.

John B. Hart, for respondent.

Root, J.—This is an action by respondent to recover damages against appellant for breach of contract of marriage. From a judgment in favor of respondent, the case comes here on appeal.

The principal defense urged by appellant is that respondent, at the time of the mutual premises of marriage, was

¹Reported in 87 Pac. 638.

afflicted with pulmonary tuberculosis (commonly called 'consumption'), in an incurable form, and has ever since been physically incapable of entering into the marriage relation. It was the contention of the respondent, in the trial court and here, that this condition of respondent constitutes no defense to her action, for the reason that appellant knew thereof at the time he promised to marry her. It is admitted by respondent that she was afflicted with this disease at the time the engagement of marriage was entered into, although she claims that she did not know at that time that the malady affecting her was consumption. There is a conflict in the evidence as to whether or not appellant knew of the character of her illness at the time of the engagement. He swears that he did not. The question of whether or not he did, turns upon the question as to when the engagement took place. He claims that they became engaged on the evening of the 6th of January, 1904. She and her mother and stepfather claim that the engagement did not take place until the 10th of January, 1904. It appears that they had some talk about the matter on the evening of January 6, and it is admitted that she at that time took from her finger a ring and gave it to him to take to the jeweler's to be used as a measurement for an engagement ring. He took the ring, used it for that purpose, and presented her with the engagement ring on the next Sunday, January 10. Her mother and stepfather testify that, on the latter date, they informed appellant that the ailment from which respondent was suffering was consumption; that this information was given him while she was not present; that he said he would marry her notwithstanding this; that it was then planned by them that she should be sent to Arizona, where it was believed that the climate would cure or ameliorate her diseased condition.

Appellant denies that he knew of the character of her ailment until after she had gone to Arizona. Her mother testified that she informed respondent of the nature of the malady after she reached Arizona. A correspondence was main-

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tained during the time she was there, between herself and appellant, he making her many suggestions as to taking care of herself and as to the character of treatment she should follow, and sending her books and pamphlets giving such information and directions. She returned in the following April much improved, as she believed. However, she had an attack of appendicitis, necessitating an operation, which seriously weakened her. She was in the hospital sixteen days on account of this operation, leaving there on the 16th of May. It was understood between them that their marriage was to take place in June. On account of her physical condition in June, it was mutually agreed that the marriage should be postponed until autumn. When the latter season arrived, she and her parents requested appellant to carry out his promise of marriage. It seems that there had been an understanding between them that they would get married and attend the World's Fair in St. Louis, in September or October. She and her parents requested appellant to carry out this plan. He insisted that she was physically unable to be married, but that he would marry her when she recovered. The controversy growing out of the matter occasioned strained relations between the parents and appellant, and he visited their home seldom thereafter. Finally, in December, 1904, he wrote respondent a letter in effect expressing a desire to terminate the engagement.

Upon the trial there was some indefiniteness in the evidence as to the seriousness of her condition. She admitted upon the witness stand that, for about a year prior to the time of the trial, she had been sleeping out of doors on the porch at the side of the house, in order to have the benefit of the open air; that while in Arizona she had lived most of the time in a tent, being much of the time confined to her bed and having night sweats and a cough, and having had several "fainting spells;" that since her return she had been free from the night sweats, but still had the cough; that she had continu-

ously followed, and was then following, the directions and treatment recommended by appellant and the books he had furnished her; that she was taking cod-liver oil and practicing the "breathing exercises." The doctors who attended her at the hospital made an examination and found that she was at that time afflicted with pulmonary tuberculosis. One physician who examined her a few days before the trial, at the request of her attorney, testified that she at that time had the disease. In fact, it was not disputed that she had never recovered since the engagement; but she believed herself to be much improved over her condition as it was when she started for Arizona. Her stepfather testified that their family physician had said that he did not deem it advisable for her to get married. Appellant testified that his father and mother had died from this disease, and that he had for many years practiced "breathing exercises" for self-protection therefrom. He urged that, by reason of the diseased condition of respondent and of the taint in himself, the proper functions of marriage could not be consummated, and that their marriage would be detrimental to the health of her, himself, and any issue they might have, and in contravention of public policy.

As to the question of the date of the engagement, and as to whether or not he knew of her having consumption at the time he became engaged to her, while the evidence would seem to make his version reasonable, yet as the jury evidently reached the other conclusion, we will accept their findings as correct. The trial court ruled upon the evidence, and instructed the jury, upon the theory that the appellant was liable for a breach of the agreement if, at the time of the making thereof, he knew the character of appellant's ailment. Proper exceptions, in different form, questioned the correctness of this view.

The question presented to the court is this: Did appellant, under the circumstances, have a legal right to disre-

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gard the promise of marriage he had given respondent? In the domain of morals it is a maxim that a bad promise is better broken than kept. Moral considerations must have a predominating influence upon such a question as now confronts us. In fact, they constitute the reason, the basis and the life of the law applicable in a case of this character. The most profound philosophers join with the wisest statesmen in maintaining the proposition that the home is the unit of the state, and that the character of a people and the stability and welfare of the nation must largely depend upon the healthful and wholesome influence of the home life. By reason of this, we find the home and the members thereof, especially the young and dependent, sheltered by the protecting care of various statutes, all being evidences and expressions of that public policy which deems the home and its inmates appropriate objects of the solicitude and care of the state.

The paramount consideration involved in the determination of this case is not that appertaining solely to the parties to this action—although as to each of them it is of great importance—but it is as to the community, the state and to humanity in general. Here we have a man and woman engaged to be married. The man is of a family several members of which have died with pulmonary consumption. The woman is afflicted with the same disease to such an extent that it becomes necessary for her to go to a distant portion of the country to recuperate, which she does, returning with the affliction still upon her and with small, if any, assurances of recovery. Under these circumstances, if the marriage were to be consummated, what would be the natural consequences to be anticipated? Unconditional promises of marriage, exchanged by a man and woman, imply respectively that each is physically, morally, and legally competent to enter the status of matrimony, and capable, insofar as he or she knows or has reason to believe, of effectuating the principal purposes of the marriage relation. One of the most important functions of wedlock is the procreation of children. Off-

spring are the natural result and oftentimes the chief purpose of marriage. That the thought of bringing a child into the world should be one of the most serious that can engage the mind of a human being needs but to be suggested. Born amidst the most favorable environment, there lies before every babe a life of uncertainty so great that no worthy parent may contemplate it without a tremor of apprehension. Thus launched upon the sea of time and eternity, what parent can dwell upon the birth of his child without the keenest sense of anxiety and responsibility? If the child born in health and with a body of vigor be a matter of deep concern to a parent, what must be said of the advent of a babe burdened with the hereditary plague of consumption? That pulmonary tuberculosis is both contagious and hereditary, as these terms are understood (although possibly not in a strictly technical and professional sense), as well as infectious, admits of little, if any, doubt. That a mother seriously ill with that disease and a father with a hereditary taint thereof in his blood could bring forth a child exempt therefrom is unbelievable. For parents thus afflicted to bring into the world a child would be not only detrimental to the welfare of the state and an offense to the instincts of humanity, but it would be, as against the innocent babe, a moral wrong most abhorrent. Such a child must of necessity be a burden to itself and others and devoid of the joys and blessings that make life endurable. In declining to carry out his promise of marriage, it may be presumed that appellant apprehended the natural and legitimate consequences of such a union. In addition to the thought of progeny, there would be also that of the aggravation of the disease as to both himself and prospective wife, the medical expert evidence showing that the intimate association of married life would tend to augment the ravages of the malady upon each.

The apprehension felt by the people of this state from the disease under consideration is evidenced by a statute enacted

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by the legislature in 1899, entitled "An act to prevent the spread of tuberculosis," etc. Laws 1899, page 117. Section 5 of that statute reads as follows:

"It is hereby made the duty of every person having tuberculosis and of every one attending such person, and of the authorities of public and private institutions, hospitals or dispensaries, to observe and enforce the sanitary rules and regulations prescribed from time to time by the boards of health, of such cities and of the state for the prevention of the spread of pulmonary tuberculosis."

Other statutes exist having for their purpose the prevention of the spread of this and other contagious and infectious diseases. The enforcement of certain rules and the distribution of literature giving information as to the prevention and treatment of such cases is enjoined upon boards of health and others. Such a document is the "Circular of Information to prevent the spread of Consumption," which is now before us. Besides much other information and many directions, it contains the following items:

"Consumption is the most common and the most fatal of all diseases. It is a disease of the lungs caused by a germ which is breathed into the lungs or gets into the body with food. This germ of consumption comes only from some other person or animal that has the disease. . . . A consumptive should never sleep in the same bed with another person. . . . A consumptive mother should never nurse her baby; it is bad for the mother and dangerous for the baby. A consumptive should not cook or prepare foods for others. . . . When a consumptive moves to another house, notify the health authorities by 'phone or card, so that they can see that the old home is properly disinfected according to law. Do not share a consumptive's bed, or use the personal property, including dishes, belonging to one."

In the face of legal restrictions and requirements of this character, it is difficult to understand how a man or woman afflicted with this plague may legally insist upon the fulfillment of a promise of marriage which, if consummated, would endanger the health and life of both and blight the life of

any offspring that might be born. Any person entering marriage, knowing himself to be seriously afflicted with pulmonary tuberculosis, violates the spirit, if not the exact letter, of the statutes enacted to prevent the spread of that disease. The same is true of one who marries another knowing him or her to be thus afflicted. An agreement which, if executed, would thwart the beneficent purpose of such statutes, ought not to be held binding. The principles we believe controlling here have been recognized and enunciated by the courts in several of our sister states. The supreme court of appeals of Virginia, in the case of *Sanders v. Goleman*, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581, made use of the following expressions:

"Under the expression 'the act of God' is comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. Hence it is held that 'illness,' being beyond the power of man to control or prevent, is the act of God. Story on Bailments, sec. 25, 511; *Fish v. Chapman*, 2 Ga. 349; *Gleason v. Va. M. R. R. Co.*, 140 U. S. 435. It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with peculiar force to a marriage contract, the performance of which, owing to causes subsequently intervening, and altogether independent of any default of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable. *Allen v. Baker*, 86 N. C. 91; *Shackleford v. Hamilton*, 93 Ky. 80; Bishop on Marriage and Divorce, sec. 219. In the case at bar the evidence, as to which in our opinion there is no real conflict, shows that there was a predisposition, in the defendant's family, to physical trouble of the kind that had developed

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with him; that his father had died with a similar disease, and a brother with urinary trouble; that after his engagement with the plaintiff, and before the time fixed for the marriage, the defendant had, without fault on his part, developed and was suffering with a grave malady, involving the urinary organs, . . . and that an indulgence in sexual intercourse would aggravate his disease, and likely shorten his life; and that it would be not only a wrong and injustice to the defendant, but also to the plaintiff for him to marry in his condition of health. Marriage is assumed in law to be made for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation, . . . Our conclusions upon the law and upon the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of contract to marry the plaintiff."

What was there said becomes particularly pertinent to the case at bar, the evidence of the medical experts here being to the effect that copulation would be exceedingly detrimental to one afflicted as was respondent. Applicable in principle also, is the case of *Shackleford v. Hamilton*, 93 Ky. 80, 19 S. W. 5, 40 Am. St. 166, 15 L. R. A. 531, which was based upon facts about as follows: Appellant prior to his engagement to respondent had contracted syphilis, but believed at the time of his engagement that he was thoroughly and permanently cured thereof. Some time after his engagement to respondent the effects of this disease again manifested themselves in so serious a form that physicians said it was doubtless incurable. Thereupon appellant informed respondent that he could not marry her. She declined to release him from his promise and instituted an action for damages. The supreme court of Kentucky, in passing upon the case, said:

"When the marriage contract is consummated, the parties taking each other for better, for worse, for richer, for poorer, and agree to cherish each other in sickness and in

health, the fact that the social standing of the one party or other or their pecuniary condition, was not as represented, will afford no ground for relief; still, when there is a mere agreement to marry, there may be such a condition of the one party or the other as to health or other bodily infirmity arising subsequent to the agreement as would authorize either party to decline to enter into the marriage relation, and to hold otherwise would be to place such a contract upon the same footing with cases of mere personal chattels. . . . The text-books establish the doctrine that 'without sexual intercourse the ends of marriage, the procreation of children and the pleasures and enjoyments of matrimony, cannot be attained.' The first cause and reason of matrimony, says Ayliffe, 'ought to be the design of having offspring; so the second ought to be the avoiding of fornication. And the law recognizes these two as its principal ends, namely: a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence.' (1 Bishop, Mar. and Div., 6th ed., 322. . . . It is impossible for the defendant to fulfill his contract. His disease renders him incapable of marriage without actual damage to the life of the woman he marries by communicating to her and through her to their offspring a loathsome disease that is now, from the testimony in the case, gradually destroying this unfortunate man. . . . No greater crime in law or morals could have been committed by the appellant than a performance of his agreement. The purity of our social system, the interests of the public in preserving sacred the marital relation, the protection of those whose existence may spring from such an unholy alliance, as well as the future welfare and happiness of the parties themselves, require that such a construction should be given this class of contracts: and if there was no precedent for the recognition of the doctrine announced, we would not hesitate to make one."

The same court, in a subsequent case, *Gardner v. Arnett*, 21 Ky. Law 1, 50 S. W. 840, approved the decision and reasoning of the case just cited and, as to the case before it, observed:

"He [defendant] owed it to the plaintiff and to society to refuse to enter into marriage relations with her, and he had

the right to abandon the contract and refuse to marry her at any time before their marriage was solemnized."

In *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. 833, the supreme court of Vermont annulled a marriage because the wife had a venereal disease endangering the health of her husband and any children she might bear. To the same effect, in principle, were the decisions in *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 68 Am. St. 440, 41 L. R. A. 800; *McMahon v. McMahon*, 186 Pa. St. 485, 40 Atl. 795, 41 L. R. A. 802; *Svenson v. Svenson*, 178 N. Y. 54, 70 N. E. 120, and *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120. In the case of *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242, the supreme court of Michigan said:

"While it is the policy of the law to encourage marriage, it is not the policy of the law to encourage unhappy marriages,"

and the court then, with express approval, quotes from Mr. Schouler, in 7 South. Law Rev., 65, the following:

"The marriage state ought not to be lightly entered into. It involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred. . . . From such a standpoint, we view the marriage engagement as a period of probation, so to speak, for both parties,—their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, and incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off."

In the case of *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444, the supreme court of North Carolina spoke as follows:

"We cannot understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself. . . . It is likewise true, that whenever the main part of an executory contract

becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why should not the same principle apply to a contract the fulfillment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them? . . . The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are, the comfort of association, the *consortium vitae*, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then, the law will excuse a noncompliance with the promise—the main part of the contract having become impossible of performance the whole will be considered to be so.”

In *Trammell v. Vaughan*, 158 Mo. 214, 59 S. W. 79, 81 Am. St. 302, 51 L. R. A. 854, the supreme court of Missouri employed this language:

“Marriage is a contract but it is not merely a civil contract, for it can only be entered into in a manner recognized by law, and can only be dissolved in a like manner. The state is the third party to every such contract, and has a direct interest therein. (*Blank v. Nohl*, 112 Mo. loc. cit. 167, 20 S. W. 477, 18 L. R. A. 350; *State v. Bittick*, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587.) Certain marriages are prohibited by law because of their detrimental effects upon society and the human species. Every contract of marriage implies that the contracting parties know of no legal or physical impediment to the contractual relation and its consequences. . . . If the disease is of a temporary character, such as was the case here, and could be easily cured, the defendant is entitled to postpone the marriage until he is cured; and if the disease is of a permanent character, such as was the fact in the North Carolina, Kentucky, and Virginia cases cited, the defendant is not only entitled to refuse to carry out the contract, but it is his duty to do so.”

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In the case of *Gring v. Lerch*, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314, the supreme court of Pennsylvania spoke as follows:

"It is a mistake to suppose, as was assumed in the point, and affirmed by the court, that the impediment must be of such a nature as would be a ground of divorce after marriage. We are not now dealing with a question of divorce. That is a subject that is regulated by statute, and has no necessary relation to the case in hand. We are considering a contract to marry; a contract which calls for the richest good faith on both sides, and which neither party has the right to enforce against the other, if incapable of performing the full marital duties. A man does not contract to marry a woman for the mere pleasure of paying for her board and washing. He expects and is entitled to something in return, and if the woman with whom he contracts be incapable, by reason of a natural impediment, of giving him the comfort and satisfaction to which, as a married man, he would be entitled, there is a failure of the moving consideration of such contract, and no court ought to enforce it by giving damages for its breach."

In the early case of *Atchinson v. Baker*, 2 Peake (N. P.) 103, Lord Kenyon said: "It would be most mischievous to compel parties to marry who could never live happily together;" and he cites Lord Mansfield as having held, in the case of *Foulkes v. Sellway*, 3 Esp. 236, that a defendant was not liable in damages for breach of promise where the character of the woman turned out to be different from what he had reason to believe it, and that an infirmity, either bodily or mental, would excuse fulfillment of the marriage agreement.

It is a fundamental proposition that a contract contravening the provisions or policy of a public law is void or voidable. *Macintosh v. Renton*, 2 Wash. Ter. 121; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Bowman v. Gonegal*, 19 La. Ann. 328, 92 Am. Dec. 537; Bishop, Contracts (enlarged edition) § 470, reads:

"No agreement between parties to do a thing prohibited

by law, or subversive of any public interest which the law cherishes, will be judicially enforced."

And at § 473, the following appears:

"A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibited by a statute, termed a contract against public policy (or sound policy), is likewise void."

9 Cyc. 481, says this:

"If an agreement binds the parties or either of them, or if the consideration is, to do something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. If the court should enforce such agreement it would employ its functions in undoing what it was created to do. It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it has sometimes been, the policy of the law or public policy in relation to the administration of the law. Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not its actual injury to the public in a particular instance."

To the same effect: 15 Am. & Eng. Ency. Law (2d ed.), p. 933.

Counsel for respondent cite us to cases where a man, promising to marry a woman whom he knew to have been formerly unchaste, was held to be bound by such promise. Such a case and this are not analogous. There the man by his promise overlooks the former shortcomings of the woman, and it is a matter concerning him only. She would have the ability to, and presumably would, reform and become a good wife and worthy mother. This is to the advantage of

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society, and not inconsistent with sound public policy, and the law should interpose no hindrance thereto. But a consumptive woman is physically incapable of becoming a healthful companion or the mother of healthy issue. It is not a condition that she voluntarily created or can change at will. The evils to follow her marriage could not be confined to herself and husband, but must of necessity concern and injuriously affect others. The nature and natural sequences of a contract of marriage are such that the state is of necessity a third party to, and interested in, every such agreement. Its interests forbid the enforcement of such a contract between parties physically incapable of making the married state beneficial to themselves or society.

We are not disposed to take into consideration any matters personal only to the appellant. If he knew of the nature of respondent's ailment when he agreed to marry her and agreed to make her his wife, notwithstanding the same, he ought not to escape responsibility by reason of any inconvenience affecting only himself. But the interests of the community and state step in and, with dictates of humanity, demand that no human compact shall be upheld that has for one of its principal objects the bringing into the world of helpless, hopeless, plague-cursed, innocent babes. We can sanction the breaking of a promise and relieve from the terms of a deliberate agreement only when the alternative involves results more deplorable. Had these parties married, it is inconceivable that any of the important ends of marriage could have been attained. It is morally certain that sickness, grief and sorrow must have been the sequence of such a union. These considerations, with the possibility and probability of issue afflicted with this terrible malady, constrain us to hold that the marriage agreement was not binding—that it was the privilege of either party to withdraw therefrom. Rule 126 of Greenhood on Public Policy reads as follows:

“No one can estop himself from proving facts which will

show a contract to be opposed to public policy." It having been the privilege and, as we believe, the moral and legal duty of appellant to decline to carry out the agreement, he cannot be held responsible in damages for so doing.

The following authorities bear on some of the questions here involved: *Turnbull v. Farnsworth*, 1 Wash. Ter. 444; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 79 Am. St. 961, 51 L. R. A. 889; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 32 Am. St. 446, 15 L. R. A. 834; *Armstrong v. Toler*, 11 Wheat. 258; *Ah Doon v. Smith*, 25 Ore. 89, 34 Pac. 1093; *Tatum v. Kelley*, 25 Ark. 209; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Ralston v. Boady*, 20 Ga. 449; *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. 833; *Gulick v. Gulick*, 41 N. J. L. 13; *Kantzler v. Grant*, 2 Ill. App. 236; *Walker v. Johnson*, 6 Ind. App. 600; *Miller v. Rosier*, 31 Mich. 475; *Sprague v. Craig*, 51 Ill. 288; 4 Am. & Eng. Ency. Law (2d ed.), pp. 893, 894, and note; Wharton, Contracts, 324; Pollock, Contracts, 337; 2 Addison, Contracts, 7138; Gould & Pyle, Cyclopedia Medicine & Surgery; Story, Contracts, § 675; Anders, Practice of Medicine, 268, 270-2; Beach, Modern Contract Law, §§ 1498, 1499.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., DUNBAR, CROW, HADLEY, FULLERTON, and
RUDKIN, JJ., concur.

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[No. 6348. Decided November 26, 1906.]

ANNA HANSTAD, *a Minor, by Her Guardian Ad Litem,*
W. A. Larsen, Respondent, v. CANADIAN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

TRIAL—VERDICT. The verdict of a jury cannot be assailed on the ground that juries are inclined to be prejudiced in cases between individuals and corporations.

EVIDENCE—EXPERTS. Hypothetical questions may properly be based upon the testimony of the party proposing them.

TRIAL—MISCONDUCT OF ATTORNEY. It is prejudicial error for counsel to comment in argument to the jury upon matters eliminated from the trial by the rulings of the court, where such argument was duly objected to at the time, with request that it be withdrawn from the jury, and where the court refused such request and subsequently refused to give properly requested instructions to disregard the same.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 10, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a minor for injuries to herself and for the death of her mother, sustained by contracting a contagious disease while on a railway train. Reversed.

Thomas B. Hardin (*Bogle, Hardin & Spooner*, of counsel), for appellant.

Martin J. Lund (*Walter S. Fulton*, of counsel), for respondent.

DUNBAR, J.—Two actions were brought by Anna Hanstad, a minor, by her guardian *ad litem*, W. A. Larsen, who sued to recover for the death of her mother, Maret Hanstad, in one case, and in the other for alleged injuries to herself. Under a stipulation between the parties these cases were tried together, as they arose out of the same state of facts.

¹Reported in 87 Pac. 832.

By a subsequent stipulation they are presented to this court in the same briefs.

We will not attempt to set out the complaint verbatim, but the substance of the allegations is, that by virtue of a ticket purchased from the agent of the defendant, the mother of respondent was entitled to be carried as a passenger for hire over its said railway and on its cars and train; that on or about the 22d day of April, 1904, said minor's mother boarded defendant's train, at the city of Halifax, to be transported as its passenger for hire to Seattle, Washington; that she was duly received by defendant as its passenger for hire; that the defendant failed, neglected, and refused to furnish the minor's mother with a clean and proper car and conveyance in which to make said journey, but compelled her to ride in a dirty and unclean car which contained the germs and bacteria of a certain contagious and infectious disease, known as scarlet fever or malignant measles; that the defendant carelessly and negligently permitted the said car to be overcrowded with passengers, and neglected to have the car properly ventilated, and failed and neglected to keep said car clean and properly heated during said journey; that on the second day of said journey several of the passengers, traveling in the same car with the minor's mother, became sick with said scarlet fever or malignant measles, being a contagious and infectious disease, and the defendant negligently and carelessly allowed said sick passengers, suffering with said contagious and infectious disease, to remain in the same car with the minor's mother and in close proximity to her, and carelessly failed and neglected to furnish her with any other car, and negligently failed and neglected to take any means to prevent the spreading of said disease to the minor's mother; that thereby the disease was communicated to the minor's mother; that she became violently sick from said disease; that the defendant negligently and carelessly allowed and suffered her to remain for one whole day in said car without any attendance or assistance; that upon the ar-

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rival of the train at Winnipeg, she was removed to a pest house, where she died from said disease, within a few days; that the defendant negligently and carelessly failed and neglected to render her any assistance after she became sick with said disease, and while she was a passenger on its train, and failed and neglected to remove her from the train for care and medical attendance until after she had become delirious and unconscious from pain and suffering; that it was well known to the defendant that the car in which she was directed to ride, and in which she did ride, was dirty, overcrowded, infected with said contagious and infectious disease, and improperly heated and ventilated, and other allegations of negligence which it is not necessary to reproduce here; that the said minor is three years of age, the illegitimate daughter of said Maret Hanstad, and was wholly dependent upon her mother for her support and maintenance, care and education, and by reason of the death of her said mother was damaged in the sum of \$25,000. The allegations of circumstances and negligence in the other case were the same.

The answer of the defendant was substantially a denial of the allegations of the complaint. Appellant's contention was that the disease was measles, and not contracted upon its train by either respondent or her mother; that, even if the disease was scarlet fever, it was not contracted by any negligence of appellant, and that where and how it was contracted was unknown and not susceptible of proof. Upon these issues the case went to trial, and judgment was rendered in favor of the plaintiff for the loss of the mother in the sum of \$9,000, and for injuries to herself in the sum of \$6,000. On motion for a new trial, the judgment was allowed to stand upon the remission by the plaintiff of the sum of \$3,000 of the judgment rendered in favor of the plaintiff for the loss of the mother. From this judgment this appeal is prosecuted.

It is earnestly urged by counsel for appellant that no negligence on its part was proven, and that the judgment should

be reversed and the cause dismissed for that reason. From a careful investigation of the long record which is presented in this case, an investigation which has occupied several days. we are unable to say that there was no testimony offered tending to show negligence on the part of the appellant. On the contrary, it appears to us that there was competent testimony which, if believed by the jury, would warrant a finding of negligence. The testimony is so voluminous, the trial of the cause having consumed ten days, that an intelligent review of it cannot be made within the limits of time and space appropriately accorded to an opinion, and as the whole of the testimony cannot be reviewed, we will not attempt a review of any of it. But the condition of the cars, the treatment of the passengers by appellant's agents, the time when the disease was contracted, the character of the disease, etc., were all questions upon which conflicting testimony was offered, and questions upon which the jury had a right to pass judgment.

We note the contention of appellant that juries are prejudiced in cases of this character, and not inclined to do justice between individuals and corporations. But, if there is any force in this contention at all, it is an argument against our constitution and statutes. The jury is a co-ordinate branch of the judiciary; its duties are defined and prescribed by law, and the appellate court cannot enter into an investigation of the trial of a cause upon the assumption that the jury has been remiss in its duty. If such is unfortunately the fact, the remedy is in a change of the fundamental law.

The hypothetical questions so strenuously objected to by appellant were based upon the testimony of respondent's witnesses, and the objections to them were properly overruled.

Without particularizing, we have been unable to find any prejudicial error in the admission or rejection of testimony, or in giving or refusing to give instructions, with one exception which we will hereafter notice. In our judgment,

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the instructions given by the court clearly and fairly stated the law, and the instructions proposed by the appellant and refused by the court, with the exception above mentioned, had either been given in substance or should not have been given. In addition to this, the instructions tendered were so elaborate and so involved that, if they had been given as asked, they would have served to confuse rather than enlighten.

It is contended, however, that the appellant was deprived of a fair trial by the course of conduct pursued by respondent's counsel during the trial of the cause; that he so framed his questions as to assume the existence of facts which had neither been admitted nor proved; that on cross-examination he constantly interrupted defendant's witnesses before they had finished answering his questions, thereby embarrassing them and preventing the elicitation of the truth, and that, by constant insinuation concerning the motives of the witnesses for the appellant, he prejudiced the jury against the appellant and its cause. A reading of the record forces the conviction upon our minds that this contention is not altogether groundless, and it is unfortunate that trial courts are not more strict in enforcing professional conduct on the part of attorneys, and in protecting witnesses from unprovoked assaults. It might be, however, considering the heat of contest, that we would not feel like reversing this judgment on any specified charge, alone, had not the counsel gone further and insisted upon commenting, in his argument to the jury, upon matters which had already been eliminated from the trial and from the consideration of the jury by the rulings of the court; these cases having been tried before a stipulation was entered into in writing, to the effect that either party, at this or any retrial of the cases, might read in evidence any part of the testimony taken at the first hearing and transcribed by the stenographer, subject to the objections then made, and with the same effect as though the particular witness were testifying on the stand again.

At the first trial certain evidence was offered by respondent and received by the court, and at this last trial it was again offered by respondent and excluded by the court upon the objection of the appellant, as immaterial and irrelevant. At the first trial, after this evidence had been received, appellant introduced testimony of one J. F. Bissell, to explain the matter which was claimed to be irrelevant, and to rebut any improper inferences therefrom. Appellant also introduced testimony by Bissell as to other relevant and distinct facts. At the last trial, appellant again introduced the evidence of Bissell as to these facts, which he claimed to be relevant, by reading Bissell's testimony under the stipulation. When appellant had read what he deemed was material of Bissell's testimony, and declined to read the remainder which had been introduced on the former trial and had been excluded at this trial on his objection, respondent's counsel insisted on having all the testimony read to the jury, and a long discussion ensued between the counsel as to the materiality of the testimony which appellant refused to read, the counsel for respondent claiming that it was unfair to read a portion of the testimony and refuse to read the balance. The court suggested to counsel that they proceed with other testimony and he would examine the testimony over which the dispute arose, and determine whether or not it was material. Upon the coming in of court the next morning, the court announced that it had examined the testimony and it was not material to this issue, and overruled the respondent's objection to its omission by appellant's counsel. The cause proceeded without reference to this matter, until counsel for the respondent addressed the jury and, during his opening argument, said to the jury, referring to the portion of the testimony of J. F. Bissell which Mr. Hardin had declined to read:

"And why, gentlemen, will he attempt to read in evidence here a portion of the witness' evidence and refuse to put in the rest, even the cross-examination of the witness? Mr.

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Hardin: I object to that statement— Mr. Fulton: If he is desiring fairness— Mr. Hardin: Upon the ground that it is an improper statement to make to this jury, in view of the fact that the court has ruled that I was right in so doing, and that the evidence was immaterial. Mr. Fulton: I have a right to comment on the evidence. The Court: The exception will be noted. Mr. Hardin: I ask the court to instruct the jury that counsel has no right to make that statement. Mr. Fulton: Under the law and the practice— Mr. Hardin: One moment. I request the court to instruct the jury that this is an improper statement and that they should disregard it. The Court: I will consider it in my instructions. Mr. Fulton: I say, gentlemen, if he is desiring fair play, and if he is actuated by a spirit of fairness, that fairness which he talked about trying to show, and you have not so much as heard me use the word once—he will say, because I do not know the meaning of it. He was just about to write that down, was not he, and he desisted. I knew he was—it would be just like him to say it. Mr. Hardin: I was.”

In order to impress upon the minds of the jury that this was an improper and prejudicial statement by the counsel for the respondent, counsel for the appellant prepared and submitted to the court the following instruction:

“I further instruct you, gentlemen, that whenever evidence is offered by either side and rejected or excluded by the court, it is so rejected or excluded because it is improper for the hearing or consideration of the jury, either because it is of such a nature that it would serve to confuse the issues rather than throw light upon them, or for some other valid and proper reason. Therefore I instruct you that you will disregard any statement made in your presence concerning any evidence which has been offered and rejected by the court in this case, and that you will not allow your minds or verdict to be affected thereby in any way or to any extent.”

The court failed to consider this question, which he had said he would consider in his instructions to the jury, and refused a proper instruction on that subject when it was offered by the appellant. It is needless to say that the comment made by counsel for respondent upon this matter was

altogether out of order, after it had been passed upon by the court. If a practice of this kind were to be tolerated, the trial of a cause would be conducted outside of and beyond the control of the court, and disorder and confusion would be interjected which would prevent the consideration of the cause by the jury under the law as announced by the court. In this case, considering the language which was used by the respective counsel in their heated controversy over this question, the jury might have well concluded, notwithstanding the ruling of the court on the admissibility of the testimony and the statement that it would consider the proposition in its instruction to the jury, that, having failed to so instruct, the comments made by the counsel for respondent were justified and met with its approval.

The amount of the judgment is questioned by the appellant, but as the verdict of the jury on this question on a new trial cannot be foretold, we will express no opinion on that point in the case.

We are exceedingly loath to reverse a cause involving so much expense and delay as a retrial of this cause will, but under the record as presented it may fairly be presumed that the rights of the appellant were prejudiced, and it therefore becomes our duty to reverse the judgment, with instructions to grant a new trial.

CROW, FULLERTON, and HADLEY, JJ., concur.

ROOT, J., concurs in the result.

MOUNT, C. J. and RUDKIN, J., took no part.

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Syllabus.

[No. 6300. Decided November 27, 1906.]

**D. E. MEIKLE, *Appellant*, v. AUGUST CLOQUET, SENIOR, *et al.*,
Respondents.¹**

JUDGMENTS—LIEN—REVIVAL. A judgment upon a contract prior to the act of 1897 may be revived by a direct action at law brought thereon.

SAME—CREDITOR'S BILL—LIEN TO SUPPORT. Where an action upon a judgment is changed by amendment to make it in the nature of a creditor's bill to set aside conveyances preventing the collection of the judgment, the lien of the judgment is not continued by the proceeding after the expiration of six years from its date, if controlled by the law of 1897, even though the amendment was made prior to the expiration of such period; as the law of 1897 terminates the lien absolutely after six years.

FRAUDULENT CONVEYANCES—HOMESTEADS—JUDGMENTS—LIEN. Conveyances of a homestead cannot be fraudulent as to a judgment creditor who, during the lifetime of his lien, took no steps to subject to his judgment its excess of value over and above the statutory allowance for a homestead.

DEEDS—DELIVERY. A deed not delivered until after the death of the grantor conveys no title.

EXECUTORS AND ADMINISTRATORS—NOTICE TO CREDITORS. A notice to creditors is not objectionable in that the administrator's signature was affixed thereto by his attorneys.

SAME—ADMINISTRATION—QUALIFICATIONS—RESIDENCE—FRAUD. The fact that an administrator is a nonresident of the state does not amount to such a fraud as to avoid the proceedings had.

SAME—NOTICE TO CREDITORS—FRAUD. Fraud in preventing a creditor from presenting his claim against an estate within the proper time cannot be predicated upon the fact that the attorney of the administrator declined, upon request by mail, to look after the collection of the debt because employed by the administrator, where such answer was promptly mailed.

SAME. It cannot be claimed that an administrator fraudulently misled a creditor as to the time for presenting his claim, where he gave the proper notices and personally notified the creditor of the necessity of presenting the claim.

¹Reported in 87 Pac. 841.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered April 5, 1906, after a trial on the merits before the court without a jury, dismissing an action upon a judgment. Affirmed.

W. W. Langhorne, for appellant.

Reynolds & Stewart, for respondents.

FULLERTON, J.—On June 12, 1899, the appellant, Meikle, recovered a judgment for the sum of \$699.62 against the respondent August Cloquet, Sr., in the superior court of Lewis county, on a promissory note executed sometime in 1894. At the date of the judgment August Cloquet was a married man, and was then living with his wife on certain real property situated in Lewis county on which they had theretofore filed a declaration of homestead. The real property at the time of the entry of judgment was of the probable value of \$5,000. The parties also owned certain personal property, which was appraised later at \$664. Mrs. Cloquet died on December 16, 1900. Just prior to her death, and during her last sickness, she joined her husband in certain deeds purporting to convey to their children as tenants in common the real property above mentioned, reserving to the grantors and to each of them the use and possession of the property during their and each of their natural lives. These deeds were not delivered during the lifetime of Mrs. Cloquet, but were held by the husband at the time of her death, and recorded by him on August 29, 1904, some years after the date of their execution. On January 12, 1903, August Cloquet filed a petition in the superior court of Lewis county asking to be appointed administrator of his wife's estate, averring that she had died intestate. On a hearing he was appointed according to his request, but later and before qualifying, he filed a supplementary petition asking for the appointment of his son, the respondent Louis Cloquet. Louis Cloquet was thereupon appointed administrator, and duly qualified as

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such. After his qualification he caused notice to the creditors of the estate to be given, caused an inventory and appraisement of the estate to be made, and otherwise proceeded with the administration as the statute directs.

On January 9, 1905, the administrator filed his final account with the estate. In the account he recited the judgment of the appellant against August Cloquet, Sr., above mentioned, but averred that no claim had been presented to the estate for it, and that he was not advised whether it was or was not a charge against the estate payable out of the property in his possession. He also set forth the property in his hands subject to distribution, and prayed that a time and place be fixed for hearing the account, that due notice thereof be given, and that on such hearing that the court settle and approve his account, and make such distribution of the property as the law required. On filing the account a time and place was fixed for its hearing and the statutory notice thereof given. At the hearing the account of the administrator was approved, and the property ordered distributed without division, one-half to August Cloquet, Sr., and one-half to the heirs at law of Mrs. Cloquet; the judgment of the appellant being disallowed as a claim against the estate because not presented within the time limited by law. This decree was entered on February 20, 1905.

On March 20, 1905, the appellant brought a common law action against August Cloquet, Sr., on his judgment, averring its due recovery and entry in the year 1899, and that the same had not been paid. Thereafter he asked and obtained leave of the court to file an amended complaint making the heirs-at-law of Mrs. Cloquet and distributees of her estate parties defendant. In this amended complaint the appellant attacks the conveyances above mentioned and the probate proceedings as being fraudulent and void. He alleged that the conveyances were made for the purpose of hindering, delaying and defrauding creditors, and that the probate proceed-

ings were void for the reason that no sufficient notice to creditors was given; that the administrator appointed was a non-resident of the state; that the administrator did not take the estate into his possession, and certain minor objections going to the account of the administrator. Issue was taken on the allegations of the complaint, and a trial had, resulting in a judgment dismissing the action. From the judgment so entered this appeal is taken.

The appellant's judgment against the respondent August Cloquet, Sr., it will be observed, since it was rendered upon a contract entered into prior to the act of 1897, was one capable of being revived and continued, either by a direct action at law brought upon the judgment, or by the special proceeding provided for in §§ 262 and 263 of 2 Hill's Code. *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; *Palmer v. Labree*, 23 Wash. 409, 63 Pac. 216; *Fischer v. Kittinger*, 39 Wash. 174, 81 Pac. 551.

The appellant insists, however, that notwithstanding the action was begun as an action at law upon a judgment, its entire scope and purpose was changed by the amendment permitted by the court, and that the action as prosecuted is in no sense an action to revive or continue a judgment, but that it is one in the nature of a creditor's bill to set aside certain fraudulent conveyances and proceedings which the judgment debtor and his privies in interest have interposed to prevent the collection of the judgment by execution. The trial court, accepting this view of the action, held that the judgment on which the action was founded became dormant and ceased to be a lien upon any of the respondent's property at the end of five years from the time of its rendition; namely, June 12, 1904, and was incapable, because not a lien, of supporting a creditor's bill. The appellant insists in this court that this is an erroneous view of the judgment. He argues that, inasmuch as the judgment was entered after the passage of the act of 1897, it is governed by that statute, and that its lien continues for six years after the date of its entry, and conse-

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quently was a valid and subsisting lien at the time the amended complaint was filed by which the purpose of the action was changed and the additional defendants brought into court; and that, inasmuch as it was a valid and subsisting lien on the property at that time, the proceeding had the effect of stopping the running of the statute and of continuing the existence of the lien until the final determination of the action.

But it has seemed to us that if the appellant's view of the judgment be correct, namely, that it is controlled by the statute of 1897, it does not follow that its lien has been continued by this proceeding. On the contrary, the statute expressly provides that such a judgment ceases to be a lien after the expiration of six years, against either the estate or the person of the judgment debtor, and that no suit, action, or other proceeding shall ever be had upon it by which its duration shall be extended or continued for a greater or longer period than six years from the date of its entry. Laws 1897, p. 52. If the judgment cannot be continued for a longer period than six years by a direct action or proceeding brought for that purpose, it must follow that it cannot be continued by an indirect or ancillary action brought to remove fraudulent conveyances made to cover up property subject to execution under the judgment. We think, therefore, whether the judgment be treated as a judgment capable of revival, or as one under the statute of 1897 which expired absolutely at the end of the six-year period, it was insufficient to support the present action.

But if we were to take the other view of the matter and agree with the appellant that "fraud vitiates everything," still we must reach the same result. The appellant's judgment was never a lien upon the homestead of August Cloquet and wife. *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786. While the appellant might, during the lifetime of his lien, have subjected the homestead to sale for its excess of value over and above the value allowed by statute by complying

with the statutory requirements, yet, he must have exercised this right while the claimants held the land. If he delayed until after the claimants parted with it, whether they conveyed by deed or otherwise, his remedy to sell for even this surplus was lost. If, then, the deeds from August Cloquet and wife to their children were valid between the parties, they were not fraudulent as to the appellant, as the property conveyed was their homestead, and the appellant had taken no steps to make his judgment a lien upon the property. But these deeds were not even sufficient as between the parties. They were not delivered, if delivered at all, until after the death of the wife, and this fact alone rendered them insufficient to pass her interest in the property. *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240. Moreover, they were treated by the parties and by the probate court as insufficient to pass title; and the appellant could have had his judgment allowed and paid as a claim against the estate of the deceased grantee either by presenting it to the administrator appointed by the court, or if he felt that the administrator so appointed was not rightfully entitled to administrate upon the estate, he could, as a creditor, have had some person lawfully entitled appointed in his stead, and presented the claim to him. These deeds, therefore, under any view of the case, have never stood in the way of an execution upon the appellant's judgment.

Nor do we find any fraud in the probate proceedings. The objection to the notice given to the creditors is that the name of the administrator was signed thereto by his attorneys instead of by himself. While we think the weight of the evidence is against the contention, it would not avoid the proceedings if the fact were otherwise. Since the statute does not expressly require the administrator to personally sign the notice, he may authorize his attorney to sign it in his name and on his behalf. There is no question that the notice was regularly published for the required time under an order of the court, and fully complied with the statute in both form and substance.

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Opinion Per FULLERTON, J.

The other objections are equally without merit. The fact that the person who administered upon the estate was a non-resident is not such a fraud as will avoid the administration proceedings. That a person applying for letters is a nonresident is good ground for opposing his appointment, and good cause for removing him after he has been appointed, but his acts as administrator, when once appointed, are neither void nor voidable and could not be set aside for that reason. This is so, even where the acts are attacked during the progress of the administration, and for a much stronger reason it is not ground for setting them aside on collateral attack after the administration has been closed. If, therefore, we reach the conclusion from the evidence, which we do not, that the administrator was a nonresident, we could not set aside the probate proceedings. The minor objections suggested do not merit special discussion.

There is a claim put forth in the brief to the effect that the conduct of the administrator and his attorney was such as to mislead the appellant, by which he was lured into security and was thereby prevented from presenting his judgment to the administrator, as a claim against the estate. The fault charged against the attorney is that, in answer to a letter from the appellant requesting him to look after the renewal and collection of the judgment, he stated that he was employed by the administrator and could not act for the appellant. This answer was mailed promptly, and it is hard to understand what more the attorney was in honor bound to do. The appellant says that the attorney ought to have informed him of his rights, but surely it would not only have been improper, but would have been presumptuous on the part of the attorney to advise him concerning his business after he had refused to accept his offer of employment. The charge against the administrator is not made clear by either the brief or the evidence, but we think there is no cause for the complaint that he misled the appellant. On the contrary, he not only gave the notices required by law to be given, but went to

the appellant personally, told him he had been appointed administrator of his mother's estate, and that in order to have his judgment adjusted it would be necessary to present it as a claim against the estate. It would hardly seem that good conscience or honesty required more.

We conclude, therefore, that the appellant has lost his right to collect his judgment by reason of his own laches, and not through any fault of the respondents. The judgment will stand affirmed.

MOUNT, C. J., RUDKIN, HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 6337. Decided November 28, 1906.]

J. L. TODD, *Plaintiff*, v. JOHN FRANSVOG *et al.*, *Respondents*,
JENS N. JENSEN, *Appellant*, and UNITED STATES
FIDELITY AND GUARANTY COMPANY, *Intervener*.¹

MECHANICS' LIEN—RIGHT OF GUARANTOR TO MAINTAIN. One who guarantees a surety company upon a building contractor's bond against loss by reason of failure to perform the contract cannot claim a mechanics' lien on the building, under a subcontract subsequently entered into with the contractor.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 2, 1906, after a trial on the merits before the court without a jury, dismissing an action to foreclose a mechanics' lien. Affirmed.

Harry H. Johnston (*Govnor Teats*, of counsel), for appellant.

Frank Allyn, for intervener.

Charles L. Westcott, for respondents.

MOUNT, C. J.—This action was brought to foreclose certain liens for labor and material furnished in the construction

¹Reported in 87 Pac. 831.

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Opinion Per MOUNT, C. J.

of a dwelling house belonging to respondents Olson and wife. The lien claim of Jens N. Jensen was denied, and he appeals.

The facts are as follows: On April 4, 1904, O. G. Olson and wife were the owners of lot 7 and 8, in block 1512, in the city of Tacoma. On that day they entered into a contract with John Fransvog, whereby the latter agreed to furnish the materials and construct a dwelling house upon the said lots. Fransvog was required to, and did, give a bond for the faithful performance of his contract and to protect the said Olson and wife from lien claims against the said house. The United States Fidelity & Guaranty Company furnished the bond, but before doing so required Fransvog to guarantee the company against loss. The appellant Jens N. Jensen became such guarantor for Fransvog, and joined with Fransvog in the application to the company for the bond, designating himself as a partner with Fransvog. Thereupon the bond was executed and delivered by the company. At that time appellant Jensen had no interest in the contract for the construction of the house. Subsequently, however, he took a subcontract from Fransvog for the cement, plastering, etc., upon the house, for the sum of \$1,125.84. He did the work, and Fransvog paid thereon the sum of \$615, leaving a balance due of \$510.84. Thereafter appellant Jensen filed a lien claim against the premises for the balance due. Other lien claims were filed by several materialmen, and this action was begun by J. L. Todd to foreclose a lien filed by him. All other claimants were made parties defendant. The United States Fidelity & Guaranty Company, having been notified of the action brought to foreclose the liens, intervened to defend the action.

The lien claims were all enforced except the claim of Jensen. His claim was denied and dismissed, for the reason that he was a guarantor to the surety company, and therefore not entitled to maintain a lien. At the trial he sought to avoid his liability as a guarantor to the surety company, by claiming that, prior to the filing of any liens and while the owner,

O. G. Olson, had money on hand owing to the contractor, Fransvog, sufficient to pay all claims for labor and material furnished, he notified Mr. Olson and the agent of the United States Fidelity & Guaranty Company not to pay any more money to said Fransvog, and that after such notification, Olson, with the consent of the guaranty company, paid Fransvog \$1,000, which sum of money Fransvog devoted to his own use, thereby leaving an insufficient amount due upon the contract to pay the claims outstanding against the building.

We need not decide or discuss the question whether these facts, if proven, would have relieved the appellant of his contract of guaranty with the surety company, because, after carefully reading the evidence, we are convinced that appellant failed to prove the facts as claimed by him. The great weight of the evidence shows that, if he ever notified Mr. Olson or the architect or the agent of the surety company not to pay Mr. Fransvog any money on the contract, such notification was not given until after the \$1,000 payment had been made, and that thereafter no further payments were made to Mr. Fransvog. The appellant Jensen is, therefore, in the position of guaranteeing the surety company against loss, and at the same time seeking to enforce a claim against the surety company, which claim he is ultimately bound to pay. This we have held cannot be done. *Kent Lumber Co. v. Ward*, 37 Wash. 60, 79 Pac. 485; *Spears v. Lawrence*, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. 789. The trial court was therefore right in dismissing appellant's claim. The judgment is affirmed.

DUNBAR, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

Crow and Root, JJ., took no part.

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Opinion Per Root, J.

[No. 6514. Decided November 28, 1906.]

JOHN REGAN, *Respondent*, v. SCHOOL DISTRICT NO. 25 OF
SNOHOMISH COUNTY *et al.*, *Appellants*.¹

SCHOOLS AND SCHOOL DISTRICTS—BUILDING SITE—MEETING OF ELECTORS—NOTICE—SUFFICIENCY. The notice of a meeting of the voters of a school district to decide upon the selection of a school building site and authorize its purchase need not state the hours at which polls will be opened, as voting by ballot is not required, and a notice fixing the time of the meeting at one o'clock p. m. is sufficient.

STATUTES—CONSTRUCTION. The construction placed upon a statute by the department of education, long acquiesced in, should be given weight in its interpretation.

Appeal from an order of the superior court for Snohomish county, Black, J., entered August 23, 1906, denying a motion to dissolve a temporary injunction enjoining the purchase of a school building site. **Reversed.**

McMurchie & Locke, for appellants.

Padgett & Bell, for respondent.

Root, J.—A meeting of the voters of appellant school district was called, under the authority of Bal. Code, § 2442, by order of the board of directors. Notice of said meeting was given by posting the following notice:

“No. 26.

“Notice of Special School District Meeting.

“Notice is hereby given that a special meeting of the legal school electors of school district No. 25, of Snohomish county, Washington, will be held at Primary School building in said district on the 8th day of August, 1906, beginning at the hour of one o'clock p. m. of said day, for the purpose of determining the location of a school site and the erection of a four room building thereon for school purposes.

“By order of the Board of Directors.

“Dated this 27th day of July, 1906.

“(Signed) M. Swinnerton, School District Clerk.”

¹Reported in 87 Pac. 828.

Pursuant to said notice, a meeting was held at the hour and place named, there being some twenty-two voters present. The electors at said meeting determined on the location of a school site and authorized its purchase, and adjourned after being in session about thirty minutes. Thereafter respondent instituted this proceeding to enjoin appellant from proceeding to purchase said site, and from issuing bonds or warrants in payment thereof and from the payment of any bonds or warrants already issued for that purpose. A temporary injunction was issued. From an order denying the motion to dissolve said injunction, this appeal is taken.

The only question presented upon the appeal is as to the sufficiency of the notice hereinbefore set forth. It is contended by respondent that this notice is fatally defective under the statute and the decision of this court in the case of *Peth v. Martin*, 31 Wash. 1, 71 Pac. 549. In that case § 2280 of Bal. Code was construed, and it was held that the clause "By posting written or printed notice in like manner as is provided for calling an annual school district election," required that the notice should state the "hours between which the polls will be kept open" as provided for notice of annual elections. Said section 2280 makes provision for a meeting of the residents of two or more school districts for the purpose of establishing a union or graded school, and provides that if a majority of the electors of each district shall vote to unite, a union district is created.

This court in effect held, in the *Peth v. Martin* case, that the meeting provided for by said section of the statute is virtually an election, and that consequently the notice should set forth the hours during which the polls are to be kept open. But the meeting provided for by § 2442 is not an election, and we do not think that there is anything in the statute requiring a vote by ballot, a ballot box or the keeping open or closing of polls. It was a meeting of the voters of the district for conference and consultation, fashioned after the town meetings of the New England and other older states of

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the Union. That it was not intended to be an election is evidenced by the fact that no provision is made by the statute for an inspector, judges, or other election officers; but provision is thereby made for a chairman and a clerk of such meeting and for a record of the proceedings to be kept, certified and filed by said clerk. It is possible that ballots and ballot boxes might be used, but there is nothing in the statute requiring them, and nothing prescribing any particular form of voting at such a meeting. This being true, it would seem that those participating might themselves adopt and carry out any method of procedure and manner of voting which they might desire. If the business legally coming before such a meeting could be considered and voted upon in any manner satisfactory to the electors present and disposed of within a half hour, there appears to be nothing in the statute requiring the meeting to remain longer in session. The only defect alleged to exist in said notice is the omission to state the hours during which the polls would be kept open. We cannot see why a notice should be held defective solely by reason of the omission of such information when, as a matter of law, no polls were required, no voting by ballot made essential, and no period of duration of the meeting prescribed. 1 Dillon, *Municipal Corporations* (3d ed.), §§ 9-28; *State v. Board of Sup'rs Racine Co.*, 70 Wis. 543, 36 N. W. 399; *Commonwealth v. Smith*, 132 Mass. 289; *Chicago etc. R. Co. v. Mallory*, 101 Ill. 583; *State ex rel. Bruce v. Davidson*, 32 Wis. 114; *Seaman v. Baughman*, 82 Iowa 216, 47 N. W. 1091, 11 L. R. A. 354.

The notice here involved is in form that prescribed by the superintendent of public instruction and published with the school laws for many years. While the construction placed upon a statute by a department of the government having to do with the subject-matter thereof is not conclusive upon the courts, yet such interpretation (and especially when long observed) will not be ignored or lightly regarded. *State ex rel.*

Smith v. Ross, 42 Wash. 439, 85 Pac. 297; *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; *Westbrook v. Miller*, 56 Mich. 148, 22 N. W. 256, 20 L. R. A. 535; *Brown v. United States*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; Sutherland, Statutory Const., 309 *et seq.*; 26 Am. & Eng. Ency. Law (2d ed.), pp. 633, 634, 635.

The notice stated that the meeting would begin at the hour of 1:00 o'clock p. m. Having then commenced and continued in session until 1:30, and there not having been anything in the notice to mislead any of the voters of the district, we think no legal or sufficient reason is shown for holding the proceedings illegal.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 6490. Decided November 28, 1906.]

THE STATE OF WASHINGTON, *on the Relation of the City of Aberdeen et al., Appellant*, v. THE SUPERIOR COURT FOR CHEHALIS COUNTY *et al., Respondents*.¹

INTOXICATING LIQUORS — LICENSE — MUNICIPAL CORPORATIONS — POWER TO REVOKE LICENSE—REVIEW. A city council has power, under Bal. Code, § 2934, giving it sole and exclusive authority to restrain or license the sale of intoxicating liquors, to arbitrarily revoke a license, the statute not providing for notice, hearing or method of finding the facts; hence the council's action is not subject to review by the courts.

SAME—PROHIBITION—TO REVIEW REVOCATION OF LIQUOR LICENSE—ADEQUATE REMEDY BY APPEAL. Prohibition lies to prevent the superior court from reviewing the action of a city council in revoking a liquor license, since the action is legislative and not judicial, and since the action is discretionary and not subject to review; and the remedy by appeal is inadequate.

¹Reported in 87 Pac. 818.

Application filed in the supreme court October 8, 1906, for a writ of prohibition. Granted.

R. E. Taggart (*Agnew & Israel*, of counsel), for relators.

W. H. Abel, for respondents. The revocation of a liquor license is the exercise of a judicial or quasi judicial power. Bal. Code, §§ 2934, 2935, 5741; *State v. Mayor of St. Paul*, 34 Minn. 250, 25 N. W. 449; *Union Pacific etc. R. Co. v. United States*, 99 U. S. 700, 25 L. Ed. 496; 4 Words & Phrases, pp. 1350, 3850; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *Board v. Northern Pacific R. Co.*, 10 Mont. 414, 25 Pac. 1058; *People ex rel. Deveny v. Jerome*, 73 N. Y. S. 306; *Merlette v. State*, 100 Ala. 42, 14 South. 562; *People v. Salisbury*, 134 Mich. 537, 96 N. W. 936. This case is analogous to those where public officers are removable for cause. *People ex rel. Kasschan v. Board*, 155 N. Y. 40, 49 N. E. 257; *People ex rel. Deveny v. Jerome*, *supra*; 23 Am. & Eng. Ency. Law (2d ed.), 442; *Fuller v. Ellis*, 98 Mich. 96, 57 N. W. 33; *Murdock v. Trustees*, 12 Pick. 244; *In Re Eaves*, 30 Fed. 21; *Todd v. Dunlap*, 99 Ky. 449, 36 S. W. 541; *People ex rel. Mayor v. Nichols*, 79 N. Y. 582; *People ex rel. Munday v. Board*, 72 N. Y. 445; *State v. Common Council of Duluth*, 53 Minn. 483, 55 N. W. 118; *Gilbert v. Board of Police*, 11 Utah 378, 40 Pac. 264; *Browne v. Gear*, 21 Wash. 147, 57 Pac. 359; *Lewis v. Bishop*, 19 Wash. 312, 53 Pac. 165. The revocation was not final but there is the right of review. *Gaertner v. Fond Du Lac*, 34 Wis. 497; *People ex rel. Healey v. Forbes*, 4 N. Y. Supp. 757; *Carlson's License*, 127 Pa. St. 330, 18 Atl. 8; *People ex rel. Kimball v. Haughton*, 41 Hun. 558; *Town Council of Lexington v. Sargent*, 64 Miss. 621, 1 South. 903; *Oskosh v. State*, 59 Wis. 425, 18 N. W. 324; *Deignan v. Board of License Com'rs*, 16 R. I. 727, 19 Atl. 332; Harris, Certiorari, § 742. The granting or refusal to grant a license may be the subject of a writ of review. *Morgan v. Orange*, 50 N. J. L. 389, 13 Atl. 240; *Rhode Island Society v. Budlong* (R. I.), 25 Atl.

657; *Hillsboro v. Smith*, 110 N. C. 417, 14 S. E. 972; *Murray v. Board of Supervisors*, 23 Cal. 493; *Dexter v. Town Council*, 17 R. I. 222, 21 Atl. 347; *Wulzen v. Board*, 101 Cal. 15, 35 Pac. 353, 40 Am. St. 17; *Browne v. Gear*, *supra*; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368.

MOUNT, C. J.—This is an application for a writ of prohibition to prevent the superior court of Chehalis county from reviewing the action of the mayor and city council of Aberdeen in revoking a retail liquor license. It appears that the city of Aberdeen, on March 11, 1906, issued a retail liquor license to Simon Hoffman and W. L. McDonald, for the term of one year. Thereafter, in April, this license was, by the consent of the city, transferred to Art Burk and A. W. Jakobsson, who thereafter conducted a saloon in said city by virtue of said license, under the name of Jakobsson & Burk. On September 10, 1906, the city was notified by its police officers that the saloon conducted by Jakobsson & Burk was a disorderly place. On that same day a special meeting of the city council was called, and notice was issued by the city clerk and served upon the said Jakobsson & Burk, notifying them to "appear before the city council of the city of Aberdeen, Washington, at the council chamber of said city at the hour of 7:30 o'clock, p. m., Monday, September 10, 1906, and show cause why your saloon license shall not be revoked." This notice was served at about 4:30 o'clock of said day.

The said Jakobsson & Burk appeared at the meeting of the council, and by their attorney objected to the proceedings, upon the ground, that no charges in writing had been filed with the city council; that they had no knowledge of the nature of the purported charges; that the notice served upon them was insufficient; and that the council had no jurisdiction to revoke their license. The council, without passing upon these objections, proceeded to hear statements of certain per-

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sons not under oath, and gave no opportunity to the said Jakobsson & Burk to cross-examine such persons. The council thereupon adjourned until the next day, when a meeting was held at which said Jakobsson & Burk were not present or permitted to attend, and at which meeting a resolution was passed revoking the said license, and notice thereof was immediately given. Thereupon the said Jakobsson & Burk filed an affidavit in the superior court of Chehalis county, setting out the facts substantially as above, and also alleging that they had kept an orderly house and had in all things complied with the terms of the license, and prayed for a writ of review. On this showing a temporary writ was issued. The city of Aberdeen appeared in answer to the writ and moved to quash the same, upon the ground that the superior court had no jurisdiction to review the action of the mayor and city council in revoking the license. The superior court, on hearing this motion, denied the same, whereupon the city of Aberdeen applied to this court for a writ of prohibition.

The question presented here is, has the superior court jurisdiction to review the action of the mayor and city council of the city of Aberdeen in revoking a license to sell intoxicating liquors? We think the superior court has no jurisdiction. The statute, Bal. Code, provides at § 2934 (P. C. § 5714), that,

"The mayor and council or other governing body of each incorporated city, incorporated town, or incorporated village in the state of Washington shall have the sole and exclusive authority and power to regulate, restrain, license, or prohibit the sale or disposal of spiritous, fermented, malt, or other intoxicating liquors within the corporate limits of their respective cities, towns or villages;" etc.

Section 2935 (P. C. § 5715), provides:

"In the granting the license authorized by this chapter the proper authorities shall exact from each applicant a bond in the sum of one thousand dollars, conditioned that the applicant shall keep an orderly house, and will not sell

liquor to minors. He shall in case of violating the terms of the license forfeit the same, and be subject to the other penalties provided by law for illegal selling of spiritous, fermented, malt, or other intoxicating liquors; the authorities granting the license shall have full authority and power to declare it forfeited for the violation of any of the terms upon which it is granted."

It is claimed by the respondent that the provision that the authorities granting the license shall have full authority and power to declare the license forfeited for violation of any of the terms upon which it is granted makes the mayor and council a judicial or quasi judicial body, and that before such body may declare a forfeiture it must find, upon facts properly presented, that the terms upon which the license was issued have been violated. If the provision relied upon were supported by legislation providing rules or means by which the question of fact should be determined, the intention of the legislature would thereby be manifest, and it would then be clear that the legislature intended that, before a license might be revoked, the mayor and city council should find the facts which authorized it to revoke the license. In such case, of course, the mayor and city council would act judicially in determining the questions of fact. But it is conceded that there is no statute prescribing a procedure by which the mayor or council may determine these facts. Inasmuch as the mayor and council of the city are a legislative body and not judicial, and inasmuch as no rules have been enacted providing for a judicial determination of the questions of fact, and inasmuch as the mayor and city council are given the *sole and exclusive* authority and power to prohibit the sale and disposal of intoxicating liquors, we are of the opinion that the legislature intended that such facts should be taken notice of by that body without any formal hearing or trial. In other words, a resolution regularly passed declaring the forfeiture of a license granted by that body is a legislative act and not a judicial function. *Spring Valley*

Water Works v. Bryant, 52 Cal. 132; *Grider v. Tally*, 77 Ala. 422.

Such resolution is none the less legislative because the mayor and council may have to satisfy themselves that the state of facts exists under which they feel impelled to pass such resolution. The policy of a city, as of a state, is manifested by legislation, which is enacted by reason of facts or conditions which, in the minds of the law-making power, demand such legislation, which facts the legislative power takes notice of without judicial determination. But, assuming that the mayor and city council exercised a judicial function, we are still of the opinion that their action in this respect is not reviewable, especially as regards the jurisdiction or procedure adopted. Section 2934, *supra*, provides that the mayor and council of each incorporated city shall have the *sole and exclusive* authority and power to regulate, restrain, license or prohibit the sale of intoxicating liquors within the corporate limits of the city. This means that the city authorities are given a discretion in matters of this kind, which discretion is final and conclusive and therefore cannot be reviewed by the courts. *Ryan v. Handley*, 43 Wash. 232, 86 Pac. 398. In *Wallace v. The Mayor etc.*, 27 Nev. 71, 73 Pac. 528, 103 Am. St. 747, it was held, under a statute very much like ours, that the mayor and council may act *ex parte* and arbitrarily in matters of this kind, and that their act was not reviewable, and it was there said, quoting from note 2, § 363, of 1 Dillon on Mun. Corp. (4th ed.), that:

“Licenses to sell liquors are not contracts between the state and the person licensed, giving the latter vested rights, and partaking of the nature of contracts, but are merely temporary permits to do what would otherwise be an offense, issued in the exercise of police powers, and subject to the direction of the government, which may revoke them as it deems fit.”

Many authorities are there cited. This seems to be the general rule upon the subject.

We are therefore of the opinion that the superior court is without jurisdiction to review the action of the mayor and council in revoking the license, and inasmuch as there is no adequate remedy by appeal, the writ prayed for is therefore granted.

DUNBAR, HADLEY, CROW, and ROOT, JJ., concur.

[No. 6358. Decided November 30, 1906.]

J. A. DAVIS, *Appellant*, v. PIONEER MUTUAL INSURANCE ASSOCIATION, *Respondent*.¹

INSURANCE—LOSS BY FIRE—CONDITIONS OF POLICY—PROOFS OF LOSS—SUFFICIENCY. Where a policy of fire insurance limited the liability to three-fourths of the cash value of the property at the time of the loss, and provided, as a condition precedent to action, that the proofs of loss should state the actual cash value of the property at the time of the loss, proofs of loss, stating only the estimated cost value of the material at the time of the construction of the building, are insufficient to sustain an action, where the specific objection to the proofs was pointed out to the assured, who fully understood the same, and persisted in refusing to give the actual value, which had been overstated in his application for insurance.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 9, 1905, granting a motion for nonsuit, in an action to recover upon a fire insurance policy, after a trial on the merits before a jury. Affirmed.

J. H. Naylor and Cooley & Horan, for appellant.

H. T. Granger, for respondent.

HADLEY, J.—By this action plaintiff seeks to recover upon a fire insurance policy. At the close of the testimony submitted by the plaintiff, the defendant moved for a nonsuit. The motion was granted and judgment was entered dismissing the action. The plaintiff has appealed.

¹Reported in 87 Pac. 829.

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Opinion Per HADLEY, J.

The evidence discloses that appellant is an experienced fire insurance agent and solicitor. He has been engaged in that business much of the time since 1899, and for about one year was engaged in soliciting for the respondent association. He was familiar with respondent's methods of doing business, with its forms of written applications for insurance, and with the powers of its soliciting agents. He knew that the soliciting agents had no authority to issue insurance for any given amount, or to make contracts with respect thereto, but that their authority was limited to procuring the written applications, which consisted of blank forms furnished by respondent to be filled out and signed by the applicant. These were sent by the solicitors to the home office in Seattle, and upon the information contained in the applications the respondent issued or refused to issue insurance. Appellant had ceased to be a solicitor for respondent prior to the time his application was made for this insurance. The insured property was the dwelling house of appellant, but it was not completed at the time the application was made and when the policy was issued. The application stated that the value of the property insured was \$2,300. The policy issued in pursuance of the application limited respondent's liability to an amount not exceeding \$1,700, and furthermore provided that liability should not exceed three-fourths of the actual cash value of the property at the time any loss or damage should occur. The building was totally destroyed. The policy also provided that within sixty days after the fire, unless such time should be extended in writing by the association, the insured should render a statement to the association signed and sworn to by him, stating, among other things, the cash value of the property affected and the amount of loss thereon. The fire occurred January 27, 1904, and on February 19 following, appellant prepared, signed and swore to a statement which was forwarded to respondent. The statement contained, among other things, the following:

"That said dwelling was built in the year 1903 and three-fourths ($\frac{3}{4}$) of the estimated cost value of the material and

labor in the construction of said building, as made and fixed by the Pioneer Mutual Insurance Company, and affiant at the time insurance was placed thereon, was one thousand seven hundred (\$1700) dollars, as shown in said policy No. 9422, and the same was a total loss by reason of said fire."

No other statement as to the value of the property or the loss was contained in the writing. Respondent objected to the above as not complying with the terms of the policy, since it did not purport to fix any actual value of the property at the time of the fire. Considerable correspondence and a number of conversations followed between appellant and the representatives of respondent, by which appellant was fully apprised of the nature of respondent's objection to his purported proof of loss. He insisted that no proof of value was necessary, and that he was entitled to recover the full amount of \$1,700 mentioned in the policy, since there was a total loss, notwithstanding the terms of the policy limiting liability to three-fourths of the actual value at the time of the fire. He insisted upon his right to recover the full amount named in the policy under what is known as the "valued policy statute," but this respondent appears to be exempted therefrom by § 12, chapter 97, Laws 1903, p. 146. Appellant persisted in refusing to furnish additional proof of value until the 24th day of May, 1904, when he prepared and sent to respondent another statement which contained the following:

"That said dwelling was built in the year 1903, and that the cost of the material and labor in said dwelling was the full sum of one thousand nine hundred twenty-five and 92-100 (\$1925.92) dollars."

It will be seen from the above that it did not state the value at the time of the fire as required by the policy, but refers to the cost at the time the house was built. It also disclosed that in his application he had overvalued the property by nearly \$400, and upon the basis of such overvaluation respondent had issued its policy. Appellant admitted

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in his testimony that, when he inserted \$2,300 in the application as the value, he had in mind that he could not recover more than three-fourths of the value at the time of the loss, and that that was his reason for inserting said amount. The evidence shows that, if the actual value had been written in the application, the policy would have been written for a substantially less sum. It seems conclusive from the evidence that the persistent refusal to make proof of the actual value at the time of the loss was due to the fear that it would result in reducing the amount of recovery substantially below the amount stated in the policy. This seems to explain the delay, and shows that appellant, with his experience as an insurance man, had no reasonable excuse for not making the proof called for by his policy. He at no time made the proof required, and even if his last statement should be treated as proof, it was made long after the expiration of sixty days from the date of the fire. The provision as to time fixed by the policy was a reasonable one, and should have been met by appellant, unless he showed circumstances which in reason should have excused the delay. All the circumstances show that the delay was due to his wilful refusal to comply with the policy requirements, and with respondent's demand. The policy provides that no suit shall be maintained thereon until the insured has complied with its requirements. It therefore became a condition precedent to maintain the suit that the kind of proof called for should be made, and should be made within sixty days unless the time should be extended in writing by respondent, which was not done and was not requested. Appellant failed in both particulars, and he should not now be permitted to maintain his suit in plain violation of the terms of his policy. A different question might arise if an ordinary layman, unacquainted with insurance methods and who had in some manner been misled by the insurer, were seeking relief. We have seen that appellant is not such, and there was no effort made to mislead him. He assumed to take his own course with full knowledge of

what was demanded of him, and should not now be heard to complain.

We think the nonsuit was properly granted, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 6423. Decided December 4, 1906.]

SAMUEL N. GUSTIN *et al.*, *Appellants*, v. HUGH B. CROCKETT *et al.*, *Respondents*.¹

ACTIONS—JOINDER—REFORMATION OF INSTRUMENTS. There is no improper joinder of causes of action in a complaint to reform plaintiffs' absolute deed, which was intended as a mortgage, and to restore the plaintiffs' rights in the premises by placing them in possession, and for the cancellation of a fraudulent judgment of ouster obtained by the grantors in the deed.

REFORMATION—ABSOLUTE DEED AS MORTGAGE—MORTGAGEE IN POSSESSION—TENDER OF DEBT—PLEADING. The complaint in an action against parties in possession to reform an absolute deed as a mortgage need not allege tender of the debt due, where the defendants obtained possession by fraud, and under the terms of the mortgage deed, the plaintiffs were given the right to possession.

HUSBAND AND WIFE—COMMUNITY PROPERTY—JUDGMENT OF FORCIBLE ENTRY AGAINST HUSBAND ALONE. A judgment of forcible entry and detainer against a husband alone ousting a husband and wife from community property is void, where both were in peaceable possession by no act of trespass or wrongful entry by the husband.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 8, 1906, upon sustaining a demurrer to the complaint, dismissing an action to decree an

¹Reported in 87 Pac. 839.

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absolute deed a mortgage and for the restoration of plaintiffs' rights thereunder. Reversed.

Parker & Brown, for appellants.

Blaine, Tucker & Hyland, for respondents.

HADLEY, J.—The amended complaint in this cause alleges in substance as follows: That the plaintiffs are husband and wife, and are the owners in fee of certain real estate; that they acquired the title to the premises in June, 1900, and were in the actual and lawful possession thereof on the 7th day of February, 1906, when they were wrongfully dispossessed in the manner hereinafter stated; that they occupied the premises as their homestead for about six years, and that they expended large sums of money in improving the same; that they are well advanced in life, each being of the age of seventy-four years; that the premises are of the value of \$2,500, due largely to the labor performed and money expended by them thereon; that the defendant Laura S. Crockett was the wife of a deceased son of the plaintiffs, and that she, subsequently to the death of their son, intermarried with the defendant Hugh B. Crockett, whose wife she now is; that the relations existing between the plaintiffs and said Crocketts were friendly, intimate and confidential, such as ordinarily exist between members of the same family; that while plaintiffs were engaged in improving their said homestead, they were compelled to expend sums of money for lumber and other material used in making such improvement, and that the said Hugh B. Crockett from time to time advanced to them sums of money, not exceeding in all \$470; that on or about the 6th day of May, 1901, they became indebted to him in the above sum, and were negotiating for a loan upon the premises for the purpose of paying said debt; that the said Crocketts advised them not to mortgage their property, urging that the mortgage might be foreclosed and they might lose their homestead; that they advised the plaintiffs that the

safest and best way to manage the indebtedness was for plaintiffs to make a deed to the Crocketts to secure the debt; that the possibility of loss by foreclosure would thus be avoided, and the plaintiffs would not be disturbed in their occupancy; that, relying upon said representations and having confidence in the integrity of said Crocketts, plaintiffs, for the purpose of securing said indebtedness, executed a deed for the premises to said Laura S. Crockett, which deed was absolute on its face but was, in fact, a mortgage for the purpose aforesaid; that said representations and professions of friendship made by the Crocketts were made with the false and fraudulent intent of cheating the plaintiffs out of their home; that about the 14th day of October, 1903, said Laura S. Crockett wrongfully, and in violation of the trust and confidence reposed in her, conveyed said property to her said husband, Hugh B. Crockett, which deed was in furtherance of a conspiracy to defraud the plaintiffs, in which both parties to the deed were then engaged; that about April 19, 1904, said Hugh B. Crockett made a mortgage upon said property to the defendant Janish, to secure \$650, and that said Janish had notice of the rights of plaintiffs in the property; that on the 5th day of April, 1904, the said Crocketts commenced an action against Samuel N. Gustin, one of the plaintiffs, on the false and fraudulent pretense that said Crocketts were the owners of said property, and that said Samuel N. Gustin was their tenant; that by the fraudulent use of documentary evidence, by false testimony and perjury, and by the fraudulent pretense that the alleged lease had been terminated, a judgment was obtained against said Samuel N. Gustin for the possession of the property, and a writ of restitution was issued thereon against said Samuel N. Gustin, which was executed against him and also against Sarah L. Gustin, who was not a party to said action; that said property is the community property of the plaintiffs, and that they are entitled to the use and occupancy thereof.

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The complaint prays, among other things, that the deed to Laura S. Crockett be adjudged a mortgage; that the mortgage by Crockett to Janish be adjudged fraudulent and void; that the judgment for restitution be held for naught and cancelled, and that plaintiffs be restored to possession and permitted to redeem from their said mortgage. The defendants Crockett and wife demurred to the complaint, and the demurrer was sustained. The plaintiffs declining to plead further, judgment was entered dismissing the action, and they have appealed.

It is assigned that the court erred in sustaining the demurrer. The demurrer stated three grounds; (1) that the complaint does not state sufficient facts to constitute a cause of action; (2) that several causes of action are improperly united; and (3) that it appears upon the face of the complaint that the action is barred by the statute of limitations.

The record does not disclose upon what ground the demurrer was sustained, but respondents argue two of the stated grounds of demurrer, viz., that the complaint does not state a cause of action, and that several causes of action are improperly united. With reference to the latter point we find that the pith of the complaint is that the relations of mortgagor and mortgagee exist between appellants and respondents; that respondents as mortgagees have wrongfully conveyed and attempted to incumber the mortgagors' property, and have wrongfully obtained possession thereof. Appellants simply seek by the action to be restored to their rights as mortgagors, and we think there is in effect but one cause of action stated. The demurrer is therefore not well taken on the ground that several causes of action are improperly united.

Does the complaint state facts sufficient to constitute a cause of action for the relief asked? Respondents argue that the complaint avers no tender of the amount of the alleged indebtedness; that, under the allegations of the com-

plaint, they are mortgagees in possession, and that appellants must pay or tender the amount due before they are entitled to any relief. It is true the complaint shows that respondents were in actual possession when the suit was begun, but the facts alleged with reference to their possession do not show that they are mortgagees in possession. Ordinarily one entitled to the rights of a mortgagee in possession must have obtained the possession by consent of the mortgagor, which is not true of respondents if the allegations of the complaint are true. This court has also frequently held that a mortgagee who has obtained possession through a void foreclosure which has been prosecuted in good faith, shall have the rights of a mortgagee in possession, even when the mortgagor has not actually consented. But there has been no such attempted foreclosure here. The elements which establish the rights of a mortgagee in possession do not therefore exist here. The mortgagor is entitled to possession in the absence of a specific agreement to the contrary, and this complaint avers an express agreement that the mortgagors should retain possession. They are not therefore required to tender the amount of the mortgage debt as a condition precedent to their right to possession, which they allege has been wrested from them wrongfully, and without their consent.

The complaint states sufficient facts to authorize relief to appellants, unless the facts averred with reference to respondents' suit for possession preclude relief. Respondents argue that appellants are concluded by that judgment, since they did not appeal from it, notwithstanding their allegations that the judgment was obtained by fraud. It will be remembered, however, that appellant Sarah L. Gustin was not a party to that action; that the suit was against her husband only, and that the land was the community property of the two. Manifestly the rights of the wife were not determined in that action, and the rights of the community could not be determined without her presence. Respondents cite the case of

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Saunders v. Webber, 39 Cal. 287, as an authority to the effect that a judgment in an action of forcible entry and detainer against the husband is sufficient authority to oust any member of his family. An examination of that case shows that the judgment established that the husband had forcibly and wrongfully entered and expelled another and the court held that the trespass was his, and that a judgment against him of such a character was sufficient authority to put out any member of his family. The facts here are altogether different. The averments of this complaint show that there was no trespass, but that the community owned the property, and that both members thereof were in peaceable possession. Under such circumstances the rights of the community to such a possession could not be determined in the action to which the wife was not a party. That judgment was, therefore, ineffective, and does not preclude appellants from now showing that the relation of mortgagors and mortgagees has at all times existed, and that they are entitled to all the rights of mortgagors in the premises, including the right to have the alleged wrongful conveyance, mortgage and judgment cancelled.

We think the court erred in sustaining the demurrer to the complaint, and the judgment is reversed and the cause remanded with instructions to vacate the judgment of dismissal and overrule the demurrer.

FULLERTON, DUNBAR, ROOT, and CROW, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6390. Decided December 4, 1906.]

THE STATE OF WASHINGTON, *on the Relation of H. B. Howe et al., Respondent*, v. THOMAS KENDALL, *as Mayor of the Town of Port Orchard, et al., Appellants*.¹

MANDAMUS—PARTIES PLAINTIFF—JOINDER. Two persons who have been elected to a town council may join as plaintiffs in a proceeding to compel the canvass of the election returns.

SAME—PARTIES DEFENDANT—JOINDER. In a proceeding to compel the canvass of election returns by the town board of canvassers, there is no defect of parties defendant, where the writ runs against the council and the mayor, who is a member of the board, and was served on him and on a majority of the council, although members of the council not recognized were not joined or served.

SAME—ELECTIONS—CANVASS OF RETURNS—REMEDIES. Mandamus is the proper remedy to secure a canvass of the returns of a town election, where the canvassing board refuses to act, whether the act is ministerial or there is a refusal to exercise a discretion in a quasi judicial capacity.

SAME—COSTS. Mandamus is a civil remedy in which the costs may be awarded against the defendants.

Appeal from an order of the superior court for Kitsap county, Frater, J., entered May 3, 1906, granting a mandate to canvass the returns of a town election, after overruling a demurrer to the petition. Affirmed.

John G. Barnes, for appellants.

J. Henry Denning and *William A. McLeod*, for respondent.

DUNBAR, J.—This is a proceeding brought in the superior court of Kitsap county, in the name of the State of Washington on the relation of the respondents, H. B. Howe and H. P. Walker, to obtain a writ of mandate directed to Thomas Kendall, as mayor of the town of Port Orchard, a city of

¹Reported in 87 Pac. 821.

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the fourth class, and S. H. Livingstone and C. P. Ainsworth, as members of the common council of said town, to compel them, and each of them, to sit as a board of canvassers of election returns and issue certificates of election to the relators, and each of them, as members of the common council of said town. Various alternative writs of mandate were issued in the proceedings moved against by the appellants, and quashed by the court. The third alias alternative writ of mandate, and the affidavit upon which it is founded, designated as the third amended affidavit, is the one which is under consideration. The third alias alternative writ is in the same language as the third amended affidavit on which it was issued, and in substance, alleges as follows: That the town of Port Orchard is a town of the fourth class; that the relators are citizens, residents and qualified electors, etc.; that Thomas Kendall is the mayor of the town; that Livingstone and Ainsworth, together with one Radey, are the qualified and acting members of the common council, and a majority of all of said common council; that they and the mayor constitute the board of canvassers of the returns of the city election held in said town on the 5th day of December, 1905; that they are the board required by law to issue certificates of election to persons duly elected, etc.; that at a city election duly, legally, and regularly held in the said town of Port Orchard on the 5th day of December, 1905, the relators were duly elected, having duly and regularly received a majority of all the votes cast by the duly qualified electors of said town for said officers, setting forth the regularity and legality of the election, etc.; that notwithstanding the election of the relators and the rights of the relators and of the public, the mayor and city councilmen mentioned wholly failed, neglected, and refused to perform their public duty and to canvass the returns of said city election, or to sit as a board of canvassers of the returns thereof, or to declare the relators duly elected as members of the council, or to issue a

certificate of election to them as members of the council, although they had duly demanded the said action on the part of the mayor and council. This is the substance of the affidavit, although it is set out with great circumstantiality. To the third alias alternative writ, the appellants filed a demurrer, on the grounds of the defect of parties plaintiff, defect of parties defendant, and that the writ did not state facts sufficient to constitute a cause of action or proceeding, or to entitle the relators, or either of them, to any relief. The demurrer was overruled, exceptions were taken, and the peremptory writ of mandate issued. From this order and judgment of the superior court, appellants have appealed, and assigned as errors the grounds of the demurrer just noticed.

There was no defect of parties plaintiff. There was a common right to both of the relators to compel the canvassing of the election returns. Two actions to determine the same common question would simply have been a multiplicity of suits, which the policy of the law avoids when possible. This kind of an action was sustained by this court in *State ex rel. King v. Trimbell*, 12 Wash. 440, 41 Pac. 183.

Neither was there a defect of parties defendant. The law provides, Pierce's Code, § 3521 (Bal. Code § 1009):

"The council shall judge of the qualifications of its members and of all election returns, and determine contested elections of all town officers. . . ."

and it was the council that the writ ran against, and all of the council that the affidavit recognized. Whether the two alleged members were actually members of the council was one of the issues raised by the petition. In any event, under Pierce's Code, § 1420 (Bal. Code § 5766), the service upon a majority of the board would have been sufficient. The mayor was a proper party to the proceeding. He is made by law the presiding officer of meetings of the board, and as presiding officer the duty was enjoined upon him, as well as upon the others, to canvass the election returns and issue certifi-

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cates of election to these relators if the allegations of the affidavit are true.

There can be no question that mandamus was the proper proceeding in this case. If the council in the exercise of the duty that is imposed upon it by the writ is acting in a ministerial capacity, then certainly the writ will lie, for it is the special office of a writ of mandate to compel a ministerial officer to perform the duties of his office. If it is of a quasi judicial character, a discretion which cannot be reviewed by the courts, nevertheless the council can be compelled through the medium of a writ of mandate to exercise that discretion, and that is what was attempted in this case.

"And the writ has been granted to compel the common council of a municipal corporation to receive and count the vote of a member of the council duly elected and qualified, and to permit him to exercise the duties of his office." High, Extr. Legal Rem. (3d ed.), § 402, and cases cited.

See, also, *State ex rel. King v. Trimbell*, *supra*.

It was said by this court in *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, that mandamus is a procedure under the code, and that any person who has a cause that calls for its invocation has the same right to sue out the writ as he has to commence a civil action to redress a private wrong; that it is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs; that the facts stated in the affidavit for the writ might be controverted by a return, raising both questions of law and fact; that the return likewise might be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee; that judgment could be entered on the verdict or findings not only directing the issue of a peremptory mandate, but for damages and costs upon which execution might issue. And this case disposes of the final contention of the appellants that costs should not have been awarded in this case against the mayor and councilmen.

From an examination of the affidavit upon which the writ is based, we are satisfied that no error was committed by the trial court in overruling the demurrer to the same. The judgment will be affirmed.

MOUNT, C. J., ROOT, CROW and RUDKIN, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

[No. 6388. Decided December 5, 1906.]

I. M. CUSCHNER, *Appellant*, v. MADELINE L. LONGBEHN
et al., *Respondents*.¹

APPEAL—RECORD—STATEMENT OF FACTS. Where amendments have been proposed to a statement of facts, the court is without jurisdiction to certify the statement when no notice of settlement has been given, and a statement so certified will be stricken.

JUDGMENT—RES ADJUDICATA. A judgment against the vendor of personal property denying his right to recover possession, in an action brought on the theory that the transaction was a conditional sale, is *res adjudicata* and a bar to a subsequent action of replevin brought by the plaintiff against the same vendees on the theory of rescission of the sale for fraudulent representations of the vendees inducing the sale.

Appeal from a judgment of the superior court of Spokane county, Carey, J., entered December 6, 1905, in favor of the defendants, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

Samuel R. Stern, for appellant.

J. M. Simpson, for respondents.

CROW, J.—This action was instituted by I. M. Cushman, plaintiff, against the defendants, Madeline L. Longbehn and John C. Longbehn, her husband, to recover possession of certain furniture. The plaintiff alleged, that the defendants

¹Reported in 87 Pac. 817.

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had fraudulently induced him to sell and deliver the furniture to them, by representing that they were the owners of certain real estate which was free from incumbrance except a mortgage for \$1,700; that they then and there offered to give him a second mortgage thereon for the value of the furniture; that relying on such representations, he was induced to, and did, sell them the furniture in question, and took a second mortgage on their real estate for the purchase price thereof; that their representations were false and fraudulent; that defendants had no right to encumber said real estate, and that plaintiff's so-called second mortgage was worthless. The theory of the complaint was that the plaintiff had elected to rescind his contract of sale and to recover possession of the property sold. The defendants alleged, that in a previous action between the same parties, the plaintiff herein had sought to recover possession of the same furniture upon the theory that it had been delivered to the defendants by him on a conditional bill of sale; that the former action had been decided in favor of the defendants, and that the furniture which had theretofore been taken by plaintiff had been ordered by the court returned to them. The plaintiff having replied, this cause was tried without a jury, and from a final judgment entered in favor of the defendants, this appeal is prosecuted.

The respondents have moved this court to strike the statement of facts for the reason that no notice has ever been given to them of the time when, or place where, it would be settled. The record shows that proposed amendments were filed and served by the respondents within the statutory time. There is no proof that any notice of the time and place for the settlement of the statement was ever served upon the respondents, nor is there any showing that they appeared at the time of settlement. Bal. Code, § 5058 (P. C. § 675), provides that, within ten days after the service of a proposed statement of facts, any other party may file and serve on the

proposing party any amendments which he may propose thereto, and that either party may thereafter serve upon the other a written notice that he will apply to the court at a time and place therein specified to settle and certify the statement. Where amendments have been proposed, the court is without jurisdiction to certify the statement, in the absence of such service of notice, or the appearance of the party who proposed the amendments. No notice having been given and no appearance of the respondents being shown, the court was without authority to make the certificate, and the statement of facts will therefore be stricken.

The only question remaining for the consideration of this court is, whether the findings of fact made by the trial court sustain the final judgment. From the findings it appears, that on March 23, 1904, a former action of replevin, No. 19024, was instituted in the superior court of Spokane county, by the appellant herein against the respondents herein, for the recovery of certain furniture alleged to have been sold to respondents by the appellant upon a conditional sale contract; that said action No. 19024 was brought to trial before the judge of said court, who, after making findings of fact and conclusions of law, entered a judgment thereon in favor of the respondents and against the appellant herein, for the return of the furniture described in the complaint, or for its value in the event that the same could not be returned; that no appeal was taken from such final judgment; that this cause was begun by the appellant on April 4, 1905; that appellant alleged he returned the furniture mentioned in the original cause No. 19024, and also alleged that he had again taken the same furniture from the respondents in this action; that the first action, No. 19024, was brought upon the theory of a conditional sale contract; that this action had been brought upon the theory that possession of the same furniture had been secured by the respondents through fraud; that the respondents had answered the complaint in this action,

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denying its allegations and pleading the affirmative defense of *res adjudicata*; that upon the trial the appellant had introduced testimony; and that the defendants had simply denied plaintiff's allegations of fraud, and introduced the records of the former action.

Upon these findings of fact, which show a former adjudication between the same parties as to their right to the possession of the identical furniture here involved, the trial court entered a final judgment in favor of respondents. As it is apparent that such judgment necessarily resulted from the findings made, the same is now affirmed.

MOUNT, C. J., DUNBAR, ROOT, RUDKIN, and HADLEY, JJ., concur.

[No. 6225. Decided December 5, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. MAX A.
MOBLEY, *Appellant*.¹

RAPE—EVIDENCE OF OTHER ACTS. In a prosecution for rape, evidence of other acts between the parties is admissible.

RAPE—CONDUCT OF PROSECUTRIX—EVIDENCE—ADMISSIBILITY. In a prosecution for rape where the prosecutrix is uncorroborated except by her evident condition of pregnancy, it is prejudicial error to exclude evidence offered by the defendant tending to show that, at the time of the alleged acts and while she was a member of his household, the prosecutrix was habitually away at night from twelve to four o'clock, as tending to account for her condition and reflecting upon her credibility.

RAPE—CORROBORATION—INSTRUCTIONS. In a prosecution for rape it is proper to refuse an instruction cautioning the jury against convicting upon the uncorroborated evidence of the prosecutrix.

RAPE—SENTENCE—EXCESSIVE PUNISHMENT. *Seemle*, that a life sentence upon a defendant thirty-two years of age for rape upon a female fifteen years of age, she appearing to have consented, is excessive punishment.

¹Reported in 87 Pac. 815.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered November 8, 1905, upon a trial and conviction of the crime of rape. Reversed.

E. B. Preble (*Ira P. Englehart*, of counsel), for appellant.

CROW, J.—The defendant, Max A. Mobley, has appealed to this court from the judgment and sentence of the superior court of Yakima county, entered upon his conviction of the crime of rape, committed upon the person of one Lydia G. Palmer, a female child under the age of eighteen years.

The particular act upon which the state elected to rely for conviction was alleged to have been committed on January 15, 1905, at which time the prosecuting witness was something over fifteen years of age. She testified, that three several acts of sexual intercourse took place between the appellant and herself; that the first occurred shortly after Christmas in 1904; that the last act, being the one upon which the state elected to rely for conviction, occurred about January 15, 1905; that she lived at the house of appellant from the fall of 1904, to February, 1905; that appellant's wife, by soliciting the prosecutrix to have intercourse with appellant, aided and abetted him in the commission of the crime with which he is charged, and was present with appellant and herself in a room at their home on each of the three occasions above mentioned; that by reason of her relations with the appellant she was pregnant at the date of the trial, which occurred on October 9, 1905, and that she had never sustained sexual relations with any man other than appellant, and never with him except on the three occasions named. She failed to state whether the appellant's acts were accomplished by force, or whether she actually consented to the same, although legally incapable of giving consent. Her evidence, which was emphatically denied by appellant and his wife, was without any corroboration other than her condition of pregnancy to which she testified, and which, if it actually existed, must have been apparent to the jury.

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The appellant has made numerous assignments of error, but we will only discuss those which we regard as of controlling importance. He contends that the trial court erred in admitting, over his objection, evidence of acts of intercourse between the prosecuting witness and himself subsequent to the first act to which she had previously testified, and also in charging the jury that the state had elected to rely upon the third act for conviction. The substance of this objection is that the state should not have been permitted to introduce evidence of any acts of intercourse other than the single one upon which it relied for conviction. This contention is without merit, as shown by previous holdings of this court. *State v. Wood*, 33 Wash. 290, 74 Pac. 380; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096.

The undisputed evidence shows that, during all the time the prosecutrix lived at the home of appellant, his family and household consisted of himself, his wife, their two small children, the father and brother of his wife, and a young lady, a Miss McArdle. The appellant produced William Nichol and Charles Nichol, the father and brother of Mrs. Mobley, and also Miss McArdle, as witnesses, and in substance asked each of them to state to the jury whether or not the prosecuting witness, Lydia G. Palmer, during the time she and the witnesses were all residing at appellant's house, was in the almost constant habit of being out alone late at nights and returning at any time from midnight to four o'clock in the morning. Upon objections interposed by the state, the witnesses were not permitted to answer these questions. Thereupon the appellant by his attorney attempted to state what he offered to prove by these witnesses. But the trial court interrupted him, with the statement that his offer would not be permitted. Upon these rulings the appellant has assigned error.

In refusing to permit answers to the above questions, the trial court committed prejudicial error. The state was re-

lying for conviction upon evidence of the prosecutrix, which was without corroboration except in so far as such corroboration was afforded by her condition of pregnancy, if such condition in fact existed. She attributed such alleged pregnancy to the acts of appellant. The jury undoubtedly knew from her personal appearance upon the witness stand whether she was telling the truth as to her pregnancy, the usual period of gestation having then about expired. If her testimony in this regard was manifestly truthful, it necessarily appeared that some person was guilty of the offense for which the appellant was on trial. If he could do so, the appellant was therefore legally entitled to show by competent evidence what the habits and conduct of the prosecuting witness had been at or about the time she claimed he had sustained illicit relations with her. If, in fact, this young girl was habitually away from home night after night, and made a practice of returning at any time from midnight until four o'clock in the morning, she was certainly conducting herself in a highly improper manner, and was guilty of conduct which, to say the least, would seriously reflect upon her character for chastity and affect her credibility. The dates fixed by appellant's counsel in the questions above-mentioned exactly coincided with those upon which she had charged appellant. The testimony of these witnesses, had the same been admitted, might have developed evidence tending to account for the condition of the prosecutrix, consistently with the innocence of appellant. The courts have almost universally recognized the difficulty under which a defendant necessarily labors in seeking to exculpate himself from a charge of this character when once made, and a considerable liberality should be exercised in permitting him to fully show the situation of the parties and all the circumstances surrounding them at or about the date of the act charged; and this is especially proper in this state where a conviction may be had upon the unsupported testimony of the prosecuting witness.

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The appellant further contends that the court erred in refusing to give the jury the following instruction requested by him:

"The prosecuting witness, Lydia G. Palmer's relation to the alleged crime is analogous to that of an accomplice, and the jury should act upon her testimony with great care and caution and subject it to careful examination in the light of all the other evidence in the case, and the jury ought not to convict upon her testimony alone unless, after a careful examination of such testimony, you are satisfied of its truth beyond a reasonable doubt."

We think that no error was committed in this regard. The law is well settled in this state that a defendant may be convicted of the crime with which the appellant is charged, upon the uncorroborated evidence of the prosecuting witness. *State v. Fetterly, supra*; *State v. Patchen*, 37 Wash. 24, 79 Pac. 479.

We have carefully examined the entire charge given by the trial court, and find that the jury were properly instructed as to the necessity for finding the defendant guilty beyond a reasonable doubt, and that they were also sufficiently cautioned as to their duty in the matter of weighing the evidence and passing upon the credibility of the witnesses.

The appellant, as shown by the evidence, is a man about thirty-two years of age, and it appears from the record that he was sentenced by the trial court to imprisonment in the state penitentiary for the period of his natural life. As this case will be remanded for a new trial, we feel constrained to say that to our minds the penalty imposed by the trial judge seems to be excessively severe, especially in view of the facts disclosed by the record.

By reason of the error above mentioned, the judgment of the superior court is reversed, and the cause remanded with instructions to grant the appellant a new trial.

MOUNT, C. J., HADLEY, and RUDKIN, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

[No. 6523. Decided December 5, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Port Townsend Southern Railway Company, Plaintiff*, v.

THE SUPERIOR COURT FOR PIERCE COUNTY,

*Respondent.*¹

EMINENT DOMAIN—JUDGMENT—REVIEW—CERTIORARI OR APPEAL. Certiorari does not lie to review a judgment entered on the jury's award of damages whereby the petitioner was required to forthwith elect, pending appeal from the judgment, whether it would pay the award and take the property; inasmuch as all questions arising at or after the trial before the jury may be reviewed on appeal from the judgment.

Application for a writ of certiorari to review a judgment of the superior court for Pierce county, Snell, J., entered October 3, 1906, upon the verdict of a jury awarding damages in a condemnation proceeding, after a trial on the merits. Denied.

J. F. Fitch and Charles Bedford, for relator.

Walter M. Harvey, for respondent.

Crow, J.—This is an original application for a writ of certiorari. The relator, a railroad corporation, alleges that on July 16, 1906, it filed in the superior court of Pierce county its petition for the condemnation of certain real estate belonging to Stefano Barbare and Lecretia Barbare, his wife; that in the regular course of procedure an order was made adjudging a public use; that a jury, duly impaneled, returned a verdict for \$16,000, damages to be paid by the relator; that on October 3, 1906, the judge of the superior court, without notice, entered an ordinary money judgment for such damages, instead of decreeing the same to be paid by the relator prior to its taking possession of the property; that immediately thereafter the relator served and filed a

¹Reported in 87 Pac. 814.

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Opinion Per CROW, J.

motion to vacate or modify such judgment; that upon the hearing of its motion, the superior judge ordered the relator to forthwith elect whether it would take the property under the condemnation proceeding or refuse to take the same; that the relator declined to make any such election at that time, but stood mute; whereupon the court refused to vacate or modify the money judgment for \$16,000 already entered; that the relator has appealed to this court from such judgment; that its appeal has been perfected, and that without waiving any of its rights under such appeal, it now petitions for a writ of certiorari to review the action of the superior court in entering such original money judgment for damages, in ordering the relator to elect whether it would take the property prior to the determination of its appeal, and also in refusing to vacate or modify the judgment so entered. The respondents have demurred to the relator's affidavit, and the hearing in this court has been upon their demurrer.

The relator's attorneys candidly acknowledge themselves to be in serious doubt as to whether the relator is entitled to a writ of review, or whether the orders of which it complains may not be reviewed upon the appeal already perfected. They admit that they have presented this application out of the abundance of caution for the complete protection of the rights of their client, but upon the hearing have insisted that this court has jurisdiction to review in this proceeding the orders above mentioned. Although in *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, we held an appeal would not lie in a condemnation proceeding from an order adjudging a public use, and assigned as our reason that under the condemnation statute, Bal. Code, § 5645, no question could be considered on appeal other than the propriety and justness of the amount of damages, we have since had occasion to further consider the same section in *State ex rel. McCormick v. Superior Court*, 43 Wash. 91, 86 Pac. 205, where we held that an appeal from the final

judgment awarding damages would permit this court to enter upon a much broader scope of inquiry than the mere examination of evidentiary matters directly affecting the amount of damages. A writ of certiorari was sought to review alleged errors of the superior court in the procedure adopted by it in summoning and impaneling the jury which assessed the damages in a condemnation proceeding. In passing upon the relator's application, we said:

"It is, however, urged that the writ should issue to review the action of the court in ordering the open venire for the summoning of jurors and in causing the jurors who assessed the damages to be selected from persons other than those regularly drawn by the jury commissioners. It is contended that the above matter cannot be reviewed on appeal from the judgment awarding damages. The argument is based upon the following portion of Bal. Code, § 5645, to wit: 'And such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal.' It is insisted that, inasmuch as this court held that the above does not include the right of appeal from the adjudication as to the public use and necessity, but is confined to the propriety and justness of the amount of damages, it follows that no questions can be reviewed on appeal except evidentiary matters, or those which directly affect the amount of damages. We think, however, that questions involved in the immediate procedure or trial by which the damages are ascertained may be reviewed on appeal."

The substantial effect of the above language is to hold that, upon the hearing of an appeal taken from a final judgment awarding damages in a condemnation proceeding, this court may inquire into all matters of procedure, practice, and evidence which incidentally arise during the trial of the question of the amount of damages to be assessed, and it would naturally follow that any order made afterwards, arising out of or based upon the verdict for damages, may also be reviewed upon such appeal. To hold otherwise would necessitate a procedure which might frequently result in this

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court being compelled to hear, at one and the same time, an application for a writ of certiorari and also an appeal, both arising out of one and the same judgment. We must assume that the legislature had good and sufficient reasons for failing to permit an appeal from the preliminary order by which a public use is adjudged. As the practice now stands, any party who may be dissatisfied with the preliminary order of the superior court may apply for a writ of certiorari to have the judicial question of the public use finally determined by this court before damages can be assessed. This procedure avoids the possibility of any assessment of damages being made and this court thereafter holding that no public use existed. Otherwise a petitioner might be compelled, in a condemnation proceeding, to return the property after it had actually paid for and taken the same, and after this court on final hearing determined no public necessity existed. Taking a comprehensive view of the entire statute, we arrive at the conclusion that, upon an appeal from the final judgment awarding damages, all questions which incidentally arise during the trial before the jury for the determination of such damages, or after the return of the verdict of the jury, can be reviewed by this court.

As the relator will be entitled to have all the questions which it now presents finally determined upon its appeal already perfected, its application for a writ of review is denied.

MOUNT, C. J., DUNBAR, ROOT, FULLERTON, HADLEY, and
RUDKIN, JJ., concur.

[No. 6460. Decided December 5, 1906.]

WILLIAM H. SORRILL, *Respondent*, v. JAMES MCGOUGAN
et al., *Appellants*.¹

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. In an action to foreclose a mechanics' lien for less than \$100, in which the defendants counterclaim for \$350 damages, the amount in controversy is over two hundred dollars, regardless of the finding of the court.

APPEAL—REVIEW—FINDINGS. The findings of the trial court will not be disturbed because of the conflict in the testimony where there is evidence to support the judgment.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 16, 1906, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

Belden & Losey, for appellants.

John C. Kleber, for respondent.

PER CURIAM.—The plaintiff, W. H. Sorrill, instituted this action to foreclose a lien for labor and material furnished by him in the construction of certain flues, fireplaces and brick mantels in an apartment house belonging to defendants James McGougan and Barbara McGougan, his wife. The original contract price was alleged to be \$420. The plaintiff sought to recover \$95 remaining due on the contract, and \$10 for extra work. The defendants denied that any sum was due the plaintiff, and alleged that the flues were not built in accordance with the contract; that their construction was so defective as to cause them to smoke and be unfit for use; and that the defendants had been thereby damaged in the sum of \$350, for which they asked judgment.

¹Reported in 87 Pac. 825.

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The trial court made findings of fact, to the effect that the defendants, acting through their agent, one T. A. Moar, had entered into a contract with the plaintiff for said work, for the sum of \$410; that the plaintiff had completed said contract; that the defendants had paid thereon the sum of \$325; that they are entitled to a further credit of \$6 for furnishing hoods for the fireplaces, and \$10 for cleaning the flues; that there was due and unpaid to the plaintiff the sum of \$79, with interest, and that the plaintiff was not entitled to a lien for the reason that his notice had not been filed within the statutory time. From a judgment in favor of plaintiff for \$79, interest and costs, the defendants have appealed.

The respondent has moved to dismiss the appeal, contending that although this was originally an action in equity, it ceased to be such when the court found that he was not entitled to a lien, and that the original amount in controversy is less than \$200. By their answer the appellants contend (1) that no sum whatever was due the respondent; and (2) that they had sustained damages in the sum of \$350, for which they asked judgment. Had the appellants succeeded in fully establishing their counterclaim they would have been entitled to a judgment for \$350. The amount in controversy is, therefore, over \$200, and the action is appealable without regard to the question as to whether it continued to be an action in equity. The motion to dismiss is denied.

The only question raised upon the merits is one of fact. It appears from the evidence, that the respondent was to perform his contract in accordance with plans and specifications prepared by the appellants' architect, who did not superintend the work; that the appellants' agent, T. A. Moar, was authorized to let subcontracts and superintend all construction as the work progressed; that Mr. Moar was present from time to time during the progress of the building of the mantels, flues, and fireplaces, but failed to object to the char-

acter of work being done by the respondent, or to demand that any change be made; that when the work was substantially finished, he paid respondent on account thereof the sum of \$325; that appellants made no complaint as to the character of the work until after the contract had been fully completed, and that appellants' tenants are now using the mantels, fireplaces, and flues. Although there is some conflict in the evidence as to whether the work was actually done in accordance with the plans and specifications, we conclude from the entire record that the findings of the trial court should be sustained, and that they support the judgment, which is affirmed.

[No. 6319. Decided December 5, 1906.]

HARRY T. TRAYNOR, *Respondent*, v. WILLIS N. WHITE *et al.*,
Appellants.¹

CONTINUANCE—ABSENCE OF PARTY—DISCRETION OF COURT. It cannot be said that the trial court abused its discretion in refusing a continuance on the ground of the absence of one of the defendants, who for some time had been ill in another state, where the action had been pending a long time, the trial had been continued two or three times, and the plaintiff admitted that the absent defendant would testify as claimed in the affidavit for a continuance.

APPEAL—REVIEW—INCOMPETENT EVIDENCE—HARMLESS ERROR. The admission of incompetent evidence is not ground for reversal in an action tried without a jury where there is a trial *de novo* on appeal.

APPEAL—RIGHT TO APPEAL—CESSATION OF CONTROVERSY. Where a tender was made by defendants and paid into court, the receipt of the same by plaintiff to be applied on the judgment after appeal and supersedeas is not a waiver of the judgment determining the action.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 14, 1906, upon findings in favor of the plaintiff, after a trial on the merits before

¹Reported in 87 Pac. 823.

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Opinion Per Root, J.

the court without a jury, in an action for an accounting. Affirmed.

Blaine, Tucker & Hyland (F. R. Conway, of counsel), for appellants.

J. E. McGrew, for respondent.

Root, J.—This was an action for an accounting. From a judgment in favor of respondent this appeal is prosecuted.

Respondent and appellants entered into an oral agreement to engage in the business of general contracting and building. White was to furnish the money, McCleary solicit business and make estimates on prospective contracts, and respondent was to have charge of the construction work. Respondent alleges that the net profits were to be equally divided among the three after he had been paid at the rate of \$5 per day for each day employed on contract work. When the case came on for trial, it appears that the only question involved was as to the allowance of the \$5 per day to respondent, he maintaining that he was entitled to that upon all work, while appellants claimed that he was entitled to this allowance upon one certain contract only. The case was tried before the court without a jury. Findings and conclusions were made, and exceptions to material portions thereof properly taken by appellants.

One of the principal errors assigned is upon the action of the trial court in not granting appellants a continuance on account of the absence of appellant White. It appears that when the case was first called for "setting," in October, 1905, it was continued at appellants' request, and was afterwards set for December 26. When this day arrived, the court, being otherwise occupied, continued the case until after the holidays, at which time appellant White filed a motion for a further continuance, setting up as a cause his sickness and absence from the state. The case was then reset for January

30, 1906. On the 29th of January, appellants' attorneys again asked for a continuance, and filed in support thereof an affidavit of one of their attorneys, which referred to and made a part thereof a telegram and letter from one A. J. Bennett, claiming to be White's physician, and residing at Jamestown, New York, where White was at that time visiting. This telegram and letter were dated respectively the 11th and 12th of December, 1905. A second telegram from Bennett was also filed in the case. The letter and telegram were to the effect that White had been, and was, ill and unable to make the trip from New York to Seattle at that time. The affidavit of the attorney set up at much length the evidence which it was claimed that appellant White would give if present. The respondent admitted in open court that said White, if present, would testify to all the matters set forth in said affidavit. The trial court thereupon denied the motion for a further continuance, and caused the parties to go to trial. Appellants urge that the admission by respondent that appellant White would testify as set forth in the affidavit was not sufficient to justify the court in going ahead with the trial; that as White was a party to the action, the case stood upon a different basis from what it would if he were merely a witness, and urged that his personal presence was essential to the proper management of his case upon the trial.

There is some force in this contention. Ordinarily the court will not go into a trial when one of the parties, on account of sickness or other unavoidable cause, is unable to be present. But there are, and must of necessity be, some exceptions to the rule. The rights of the other party in the premises and all of the matters and circumstances connected with the case should be taken into consideration by the trial court, and in the light of all of these matters said court should grant or deny the application for a continuance according as he believes the interests of substantial justice demand. In this case the transactions sued upon had oc-

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curred a long time prior to the trial. Respondent had been kept waiting for his money if, as a matter of right, he was entitled to such. The hearing of the cause had already been continued two or three times. There were two defendants, one of whom was personally present and testified at the trial. The granting or denial of a motion for a continuance is addressed to the sound discretion of the trial court, and its decision upon such a motion will not be disturbed unless it appears that there has been an abuse of discretion. In the light of all of the circumstances of this case, we cannot say that such abuse appears. *Puget Sound Machinery Depot v. Brown Alaska Co.*, 42 Wash. 681, 85 Pac. 671.

Upon the question as to whether respondent was entitled to \$5 a day upon one or all of the contracts, there was a conflict in the evidence, and we are unable to arrive at a different conclusion from that reached by the superior court.

It is suggested that some of the evidence introduced was incompetent. This court has frequently announced that, where a case is heard by the trial court without a jury and tried here *de novo*, incompetent evidence will not be considered, and its introduction in the trial court will ordinarily not be deemed cause for a reversal.

Appellants admitted an indebtedness to respondent of \$166.43 and \$9 costs, and tendered and paid that amount into court. After the decision was rendered, the respondent received said money from the clerk and receipted therefor. The judgment has the following recitation:

"It is further ordered that the money paid into the registry of the court, to wit, \$175.45, by defendants, be paid to plaintiff Traynor, and applied on account of the judgment hereby granted him against said defendant White."

Appellants claim that they had given notice of appeal and filed a supersedeas bond before the order of the court was made allowing respondent to withdraw the \$175.45, and urge that this action of respondent was an acceptance of the tender

and sufficient to defeat and determine his cause of action; that when the supersedeas bond was filed, the respondent was restricted solely to relief thereupon, and had no right to receive the tender deposited. We cannot sustain this contention. There is some conflict as to what took place and as to the relative dates upon which different things were done touching the taking of the appeal, filing of the supersedeas bond, and withdrawal of the deposit. But even if it be conceded that these matters are as maintained by appellants, we are not convinced that the taking of the deposit would have any effect other than to constitute a payment *pro tanto* upon respondent's judgment.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

CROW, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6389. Decided December 5, 1906.]

H. P. DEAN, *Respondent*, v. OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*.¹

PARENT AND CHILD—EMANCIPATION. Where a minor ran away from home and enlisted in the army, any manumission depriving his parents of the right to his services is effective only during the time he was engaged in the public service.

DEATH—BY WRONGFUL ACT—PARENT AND CHILD—EMANCIPATION—CONTRIBUTION TO SUPPORT—INTENT—EVIDENCE—ADMISSIBILITY. In an action by parents for the death of their minor son who had run away from home, in which the defense is that he was emancipated and contributed nothing to the plaintiff's support, conversations and letters expressing an intent on the part of the decedent to contribute to such support are not incompetent as self-serving declarations.

SAME—DAMAGES—RECOVERY FOR BURIAL EXPENSES. In an action by parents to recover for the death of their minor son, the sum of \$178 for burial expenses and transporting the body to the old home is a proper item for recovery.

¹Reported in 87 Pac. 824.

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Opinion Per Root, J.

SAME—DAMAGES—EARNING ABILITY—EVIDENCE. In an action by parents for the death of their minor son, who had run away from home, a recovery of about \$1,000 is justified without any evidence as to his earning ability at his parent's home or that he contributed to their support, where there was evidence as to his wages at the time of his death justifying the verdict.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 14, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for causing the death of a minor child employed on a gravel train, and knocked off a trestle by the starting of the train without warning. Affirmed.

W. W. Cotton, Thos. O'Day, and Samuel R. Stern, for appellant.

Barnes & Latimer, for respondent.

Root, J.—This case was here once before, and may be found in 38 Wash. 565, 80 Pac. 842, to which report reference is made for a more complete statement of the facts. Most of the legal questions now suggested were determined in that decision. A new trial resulted in a judgment for respondent in the sum of \$1,078, from which this appeal is prosecuted.

We are now required to pass upon the legal sufficiency of the evidence as to decedent's intention to return to his parents or contribute pecuniarily to them during his minority, he having been between eighteen and nineteen years of age at the time of his death. It is urged by appellant that, when decedent left his parents' home without their consent and enlisted in the army, he became thereby emancipated, and that consequently the parents could not maintain this action. If there was any manumission, we apprehend that it was effective only during the time that he was actually engaged in the service of the government. When he was discharged from the army, he again became, as a matter of law, subservient to the authority of his parents, and they were legally entitled to his earnings. As he had, without their consent and against

their wishes, gone away from home, thereby ignoring and disregarding their authority, it was our view when the case was here before that, before the parents or either of them could recover, there must be some showing of an intention on his part to again return, and a reasonable likelihood of his returning, or evidence of an intention and reasonable probability of contributing of his service or earnings to them, before they would be entitled to recover. Upon the last hearing certain letters written by him were introduced in evidence, as were certain conversations had by him wherein such an intention was expressed by the decedent. It is urged by appellant that these letters and these conversations constituted incompetent evidence in that they were self-serving declarations. We do not think this position tenable. There is nothing to indicate that decedent had any expectation of losing his life, and we cannot see how the doctrine of self-serving statements can be made applicable to this case. We think the letters and conversations were competent; and the question of their sufficiency to indicate a *bona fide* intention, and a likelihood, on the part of decedent to return to his parents was, under said evidence, a question of fact for the jury.

It is urged that respondent was not entitled to recover expenses for transporting the body of decedent to respondent's home in Arkansas. The total amount for this and burial expenses was \$178. We think this a moderate sum to ask. It was the duty of respondent to bury the body of his minor son, and it was but natural and fitting that the remains should be taken back to the old home. Appellant being responsible for decedent's death, it is holden to pay the reasonable cost of burial and the expenses appropriately incidental thereto. In view of these considerations and the small sum expended and sought to be recovered, we think the allowance justifiable.

It is also contended by appellant that the evidence fails to show any reasonable probability of the decedent contributing

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anything of his wages or any valuable service to the parents during his minority, and that, for that reason, the case should have been withdrawn from the jury, and judgment rendered in favor of appellant. There was no evidence as to the wages a boy of his years could earn in or about the neighborhood of his parents' home, but there was evidence as to what he was earning here at the time of his death, and it is contended by respondent that the jury had the right to take this into consideration and from all the circumstances estimate what amount might reasonably have been expected by the respondent. This question is not without difficulty, but a majority of the court believe that the amount found by the jury is justifiable and supported by the evidence.

Various assignments of error are based upon the giving and refusal, respectively, of certain instructions. An examination of these does not convince us that any prejudicial error was made. The judgment of the superior court is affirmed.

MOUNT, C. J., CROW, DUNBAR, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 6436. Decided December 5, 1906.]

*In the Matter of the Estate of NATHAN N. WETMORE,
Deceased.*

EVERETT MORGAN, EXECUTOR, *Appellant*, v. LUVENCHIA L. MORRISON, *Respondent*.¹

WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY. A finding of want of testamentary capacity is warranted by the evidence where it appears that the decedent was seventy-eight years of age, that his wife died nine days before, causing him great mental anguish, that he languished physically until his death nine days thereafter, the will being made four days before his death, at night, in the house of the sole devisee, who was not related to him, no mention being made of his children or grand-

¹Reported in 87 Pac. 1151.

children and no disposition made of a small amount of the property excepted from the general devise, and where there was evidence that at the time his mind was wandering, weak and feeble.

Appeal from an order of the superior court for Snohomish county, Black, J., entered May 14, 1906, upon findings in favor of the contestant of a will, after a trial on the merits before the court without a jury. Affirmed.

Padgett & Bell, for appellant.

Hathaway & Alston, for respondent.

PER CURIAM.—This is an appeal from the decree and judgment of the lower court in a proceeding in contest of the will of Nathan N. Wetmore, deceased, instituted by Luvencia L. Morrison, a child of the deceased.

The decedent, at the time of making the alleged will, was seventy-eight years of age. His wife died nine days prior to his death, causing him great mental anguish. He also languished physically from the time of the death of his wife, which culminated, as we have intimated, in his death nine days thereafter. The will was executed between nine and ten o'clock on Wednesday night preceding the death of the decedent Sunday morning. He died at the residence of Ella G. Wetmore, the sole devisee, where he resided from the time of the funeral of his wife until his death. None of his children or grandchildren were mentioned or provided for in the will, but he bequeathed all of his property, with a slight exception, to the said Ella G. Wetmore, between whom and himself there were no ties of consanguinity. There was no testamentary disposition of the small amount of property excepted. The court found that he was unduly influenced by the said Ella G. Wetmore, and that his mind at the time of the execution of the will was wandering, weak and feeble. This is equivalent to a finding that he did not have a sound and disposing mind.

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Other findings of the court it is not necessary to discuss here. Nor is it necessary to notice many of the propositions discussed by respective counsel, for from an examination of the record we are convinced that the finding of the court is sustained by the overwhelming weight of the testimony; and, indeed, had not the court so found, we would have been compelled to have found from the testimony that the decedent was utterly incapable of making so solemn and important an instrument as a will at the time the alleged will was executed. For this reason the judgment will be affirmed.

[No. 6404. Decided December 6, 1906.]

P. P. CARROLL *et al.*, *Appellants*, v. HILL TRACT IMPROVEMENT COMPANY, and L. C. SMITH, *Sheriff of King County, Respondents*.¹

LIMITATION OF ACTIONS—FRAUD—QUIETING TITLE. An action to quiet title on the ground of fraud, not commenced until more than twenty years after discovery of the fraud, is barred by the statute of limitations.

SAME—TOLLING THE STATUTE. The running of the statute of limitations against relief on the ground of fraud is not affected by ill health or negotiations that did not commence until the statute had run.

ADVERSE POSSESSION—PLEADING. A complaint to quiet title by the cancellation of a sheriff's deed cannot be sustained as a claim of title by adverse possession on the simple allegation that plaintiffs entered into and had since held possession, where it is not alleged to have been adverse, open or notorious.

QUIETING TITLE—LIEN FOR MONEY PAID ON EXECUTION SALE—ELECTION OF REMEDIES. One who alleges a fraudulent redemption from execution sale, and seeks to quiet title by cancellation of the sheriff's deed issued on redemption, has elected his remedy, and cannot claim that the complaint entitled him to a lien on the premises for money paid on the execution sale; his remedy therefor being against the sheriff.

¹Reported in 87 Pac. 835.

EXECUTION—HUSBAND AND WIFE—COMMUNITY PROPERTY—CERTIFICATE OF SALE—REDEMPTION. A certificate of sale issued to a husband, who is alone the judgment creditor, is not evidence of an interest in community real estate pending redemption, and notice of redemption to the husband alone is sufficient.

ESTOPPEL—ACCEPTANCE OF DEED. The acceptance of a deed from plaintiff to defendant of part of the premises to which plaintiff seeks to quiet title, does not operate to estop the defendant from claiming the balance of the land in dispute.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 13, 1906, upon sustaining a demurrer to the amended and supplemental complaints, dismissing an action to quiet title. *Affirmed.*

Walter B. Beals, P. P. Carroll, and John E. Carroll, for appellants.

Peters & Powell, for respondents.

HADLEY, J.—The amended complaint in this cause alleges that, on the 5th day of June, 1884, the plaintiff P. P. Carroll obtained a judgment against W. C. Hill and others in the then territorial district court of Washington, in the sum of \$1,250; that thereafter, on the 4th day of October, 1884, by virtue of an execution under said judgment, certain real estate was sold by the sheriff to said plaintiff, in satisfaction of the judgment, and that he received a certificate of purchase therefor and satisfied the judgment, all of which was followed by confirmation of the sale; that on the 9th day of May, 1885, the then sheriff, John H. McGraw, executed and delivered to the judgment debtor, W. C. Hill, one of the defendants in that action, a redemption certificate, which was filed for record June 8, 1885. Sarah J. T. Carroll was then, and is now, the wife of P. P. Carroll, and is a coplaintiff with the latter in this action. They further allege that they neither received nor waived notice of said redemption; that the sheriff received no money from anyone for the redemption of the property; that he paid no money to plaintiffs;

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that the property never was redeemed from the sale; that the certificate of redemption was procured by the deceit and misrepresentation of Hill, the judgment debtor, to the effect that plaintiffs had waived notice thereof, and that the plaintiffs are entitled to a sheriff's deed.

It is alleged that the law firm of McNaught, Ferry, McNaught & Mitchell, mentioned in the redemption certificate as attorneys for the plaintiff in that action, had no authority to represent the plaintiffs or to act for them in any capacity after the purchase at the sheriff's sale, the satisfaction of the judgment, and confirmation of sale; that the plaintiffs had no knowledge of said redemption until June, 1886, at which time the plaintiff P. P. Carroll demanded of the sheriff a deed to said land and was informed by the sheriff of the redemption; that the said judgment debtor Hill died about August 30, 1890; that prior to his death he promised plaintiffs to cancel the record of redemption on condition that the plaintiffs would quitclaim to him the said real estate, less the number of acres to be retained by them, and that pending negotiations for settlement said Hill died suddenly; that thereafter in the year 1894 one John W. Thompson, who claimed an interest in the land, entered into negotiations with plaintiffs for the purpose of effecting a settlement of the title to the land, which negotiations were continued from time to time at the request of Thompson until the time of his death, which occurred about May 31, 1901, and that Thompson in all his dealings with said lands knew of plaintiffs' said claim of ownership; that the tract of land contained one hundred ninety-two and forty-hundredths acres; that by said negotiations the plaintiffs were to quitclaim to Hill all of the tract except a certain fifty acres, and that such was the condition of the negotiations at the time of Hill's death; that because of the said negotiations and urgent requests of Hill and Thompson, and of their promises and assurances of an amicable adjustment, plaintiffs refrained from instituting suit to clear their

title of the cloud caused by the record and the redemption certificate, and also for the further reason that from 1891 to 1897 the condition of the health of said P. P. Carroll was such that an engagement in such litigation would have endangered his life.

It is further alleged that the defendant Hill Tract Improvement Company has succeeded to the interests of said Hill and Thompson, with knowledge of all the above facts. The said company and the present sheriff of King county are made parties defendant, and the relief prayed is, that the said redemption certificate shall be cancelled of record; that the claims of said company shall be declared inferior to the plaintiffs' rights in the land, and that the sheriff shall be directed to execute a deed to plaintiffs. A supplemental complaint was also filed, in which it is alleged that the defendant Hill Tract Improvement Company did, after the commencement of this action, for a valuable consideration, receive from the plaintiffs a deed for a part of the said land, and that it thereby recognized plaintiffs' ownership. A demurrer was interposed to the amended complaint and supplemental complaint, which was sustained. Plaintiffs elected to stand upon the amended complaint and supplemental complaint, and having refused to plead further, judgment was entered dismissing the action. The plaintiffs have appealed.

It is assigned that the court erred in sustaining the demurrer. The demurrer is based both upon general grounds and also upon the statute of limitations. The complaint is clearly one in equity to procure the cancellation of an alleged fraudulent certificate of redemption, and to effect the execution of a sheriff's deed to appellants. The theory of the complaint is, that W. C. Hill, the judgment debtor in the former suit, in June, 1885, fraudulently procured and placed of record a pretended redemption by Hill, without the payment of any money. The complaint alleges, however, that the appellants learned of this in June, 1886, and being thus ad-

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vised of the existence of the alleged fraud, they were required to seek relief within the period of the statute of limitations in such cases provided. The statute provides that an action for relief on the ground of fraud must be brought within three years, but that the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Bal. Code, § 4800 (P. C. § 285). This action was not so commenced, but was begun nearly twenty years after the admitted discovery of the facts constituting the alleged fraud. Neither the alleged negotiations with reference to a settlement nor the facts alleged about the ill health of one of the appellants could have the effect to stay the running of the statute, and in any event, so far as any dates mentioned in the complaint are shown, the negotiations did not begin until August, 1890, more than four years after the discovery of the alleged fraud, and the ill health period did not begin until about a year later. The action was therefore barred before the conditions arose which are alleged as excuses for not sooner bringing the action.

Appellants argue in their brief that they claim title by adverse possession, but their allegation on the subject of possession is simply that, after their purchase at the execution sale, they "entered upon and took possession of said land, and have ever since held said possession." They do not allege that the possession was open and notorious, or that it has been known to, or was even adverse to, respondent and its grantors. The whole complaint shows that the action was not brought to quiet title by reason of adverse possession, but to remove a cloud of an alleged fraudulent redemption certificate, and to procure a sheriff's deed as the result of the cancellation of the certificate.

Appellants also argue that they are entitled to a lien upon the lands for the money paid at the execution sale. This argument must necessarily be based upon the theory that the redemption was complete and effective, leaving the land

as that of the judgment debtor and not that of appellants, and that appellants as the execution creditors became entitled to the redemption money by reason of the payment of money at the execution sale. In such case the money must have been received by the sheriff and their remedy must be against him. The complaint, however, shows an election to treat the redemption as fraudulent, and the relief urged in argument would be inconsistent with the theory of the complaint.

It is further argued that the redemption made by Hill was ineffective for the reason that the property was community property, and that no notice of the redemption was given to the wife of the community, appellant Sarah J. T. Carroll. The complaint shows, however, that the husband alone was the judgment creditor, and that he alone was the execution purchaser. Pending the redemption period the certificate of sale did not pass title, but it was only evidence of an inchoate interest which might or might not ripen into title. *Singley v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896. If, therefore, it should be presumed that the certificate of sale was evidence of a community interest in property, still we think it was not evidence of title to community real estate, but it belonged to the classification of personal property rights, and as such it was under the management and control of the husband. Notice to the husband was therefore sufficient, and the redemption certificate recites that notice was waived by the husband. It is true the complaint negatives the fact that the husband waived notice, but we have seen that he is concluded by lapse of time, and the recitals of the certificate therefore import verity so far as the hearing upon this demurrer is concerned. Moreover the wife joins with her husband in alleging in this complaint that the facts about the alleged fraudulent redemption were discovered by her in June, 1886. She is therefore in no better position to maintain this action than is the husband.

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It is argued that, inasmuch as the supplemental complaint avers that respondent Hill Tract Improvement Company has, since the commencement of this action, accepted a deed from appellants for a portion of the land that was sold under execution, it is now estopped to dispute appellants' rights as set forth in the original complaint. It may be, if respondent has accepted a deed from appellants for certain land, that it might now, at least under some circumstances, be estopped to deny its grantors' title to the particular property already conveyed to it; but it is not thereby estopped to deny appellants' title to other land the conveyance of which it has never accepted. It may be as well said argumentatively that the fact of respondents having accepted a conveyance for a part of the property only shows with as much conclusiveness that it has not recognized that appellants have any title to the remainder.

We think the court did not err in sustaining the demurrer, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 6387. Decided December 6, 1906.]

JULIA A. BAKER *et al.*, *Appellants*, v. TACOMA EASTERN
RAILWAY COMPANY, *Respondent*.¹

RAILROADS — DEATH AT CROSSING — CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN — DUTY TO LOOK AND LISTEN. A railroad employee familiar with the locality, and experienced in the management of cars there, who was run down and killed by the backing of a logging train at a city street crossing, is guilty of contributory negligence, as a matter of law, where it appears that the place was a network of seven or eight tracks, being the intersection of two railroads, that at the time two or three engines were coming from the roundhouse

¹Reported in 87 Pac. 826.

of one company, ringing bells and blowing off steam, and that the deceased, with his attention on the engines in view, undertook to cross the tracks diagonally without stopping to look back or listen for the train coming from behind on the tracks of the other company; the doctrine that one must look and listen applying to city street crossings, and particularly to places of such great danger as the crossing in question.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered December 14, 1905, in favor of the defendant, upon the pleadings and a stipulated statement of the plaintiff's case, dismissing an action to recover for the death of plaintiffs' husband and father, killed at a railroad crossing. Affirmed.

Gornor Teats and William P. Reynolds, for appellants.

Shackleford & Hayden, for respondent.

DUNBAR, J.—Joseph Baker was run over and killed on the morning of July 28, 1905, on East D street, in the city of Tacoma, where the Northern Pacific Railway tracks cross the same, by a long Tacoma Eastern Railway train loaded with logs, backing down upon him, without any lookout or rear brakeman upon the train to protect the people passing along the street. The plaintiffs, wife and daughter of the deceased, sued to recover for the wrongful death.

The complaint alleged negligence on the part of the respondent in not having a guard upon the rear end of the train. It appears from the complaint that East D street is one of the thoroughfares over which many people pass, and especially so at the hour of seven o'clock in the morning, which was the time this accident occurred, as it is the street leading from their homes to the numerous factories, railroad shops and mills upon the tide flats; that the Northern Pacific tracks, consisting of about seven or eight tracks, cross East D street at about right angles, and its roundhouse is located near East D street; that at the time of the accident Northern

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Pacific engines were coming out of the roundhouse, going up East D street on the several tracks, two or three at a time, puffing, ringing bells and blowing off steam; that the defendant, at the time of the accident, was running or backing its train of about nine cars, with great speed, over one of the parallel tracks across said East D street, with a locomotive upon the rear end of the train which the defendant was backing. Baker was an employee of the Northern Pacific Railway Company at its roundhouse, just east of D street. The Tacoma Eastern Railway Company has a depot just west of D street, about a block to the south of the railroad track, and its tracks are so arranged as to connect with the Northern Pacific tracks, and to switch back and forth upon them and across East D street, down to the city waterway where it unloads its train-loads of logs.

It appears that, while the engines were ringing their bells and blowing off large quantities of steam, and when one of the engines of the Northern Pacific was on the track in front of him and another had passed up along towards the west, probably fifty or sixty feet, and another engine was coming towards him, and other engines were on the tracks in the immediate vicinity, Mr. Baker came diagonally across the street crossing, his attention riveted upon the engines which were coming towards him; that at the time he was crossing the track upon which he was killed, he had his back towards the west, or his left side and back towards the west, as he went in the diagonal direction, when the logging train backed on him and threw him down onto the south rail of the track and ran over and killed him. Negligence was denied by the defendant, and contributory negligence alleged. After the issues were made up, it was stipulated that a statement of the case by the plaintiffs should be made, and that the court should then pass upon the right of the plaintiffs to recover. After such statement was made, construing the statement of

the plaintiffs and the pleadings, the court found that the plaintiffs were not entitled to recover, and dismissed the action. From this judgment of dismissal this appeal is taken.

The statement is quite lengthy, but we think we have said sufficient to present the situation fairly. It is the contention of the appellants that it was negligence on the part of the respondent, under the circumstances as shown by the complaint and the statement, to back its cars down across a street where pedestrians were crossing in great numbers, without a lookout or brakeman on the rear end of the cars. Conceding, for the purposes of this decision, that it was negligence for the Railroad Company to back the train across the street without a watchman, yet we think the appellants cannot recover, for the reason that such negligence was not the proximate cause of the accident, but that the proximate cause was the contributory negligence of the deceased. It is the contention of the appellants that this case is controlled by the decision of this court in *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855, and *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820. But we think to allow a recovery in this case we would have to extend the doctrine announced in those cases. In both cases the cars were sent down the track without any one attending them at all, and this court held that to be negligence. But in both cases the injured persons were boys of tender years, and it was held that the same degree of caution would not be demanded of them as would be demanded of an adult. In *Roth v. Union Depot Co.*, *supra*, it was said:

"By the overwhelming weight of authority a distinction is made between the responsibility of a child and that of an adult. It seems to us that it would be a monstrous doctrine to hold that a child of inexperience—and experience can only come with years—should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience. In the simplest transactions of life we recognize this distinction."

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And this sentiment was approved in the *Steele* case. But in this case the person injured was a man of age and experience, being forty-nine years old; not only experienced in the general affairs of life, but experienced in the business of railroading, experienced in the usual conduct and management of cars at the identical place at which he received the injury, having been in the employ of the railroad company at this place and working in this yard for years, and crossing this track every day during that time. The locality was a network of tracks crossing the street at different points. Engines were passing and repassing on these tracks, shrieking and rumbling, ringing bells and puffing steam, which necessarily must have given notice that it was dangerous to cross any track in that network without exercising the utmost prudence, caution and alertness. It was the duty of the deceased before crossing the track, which is a notice of danger, to look and listen.

It is contended by the appellants that the doctrine of "*look and listen*" does not apply to a railroad crossing on a street, but we think, in accordance with the opinion of the lower court, that, if there was any place where it would seem the doctrine of looking and listening would apply, it would be just such a place, where there were so many engines and trains passing over the tracks in different directions and so many switches throwing the trains from one track back and forth to another. It would be hard to conceive of a case of negligence in crossing a railroad track without due precaution if this case does not furnish an instance of negligence. It is claimed that the deceased could not see the logging train approaching him by reason of the abundance of steam emitted from other engines. But, in addition to the fact that this was a warning to him not to step on the track until he could see, or determine the safety of the place in some other way, the employment of a watchman on the end of the train would have been unavailing, for the watchman could not have seen him.

A discussion of cases would be unprofitable in the decision of this case, for every case presents a little different state of facts. But this court has accepted the doctrine announced by the supreme court of the United States, in *Chicago etc. R. Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, where it was decided:

"Before attempting to cross a railroad track, he is bound to use his senses,—to listen and to look,—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain."

It was said by this court in *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997:

"The argument that contributory negligence involves the question of what an ordinarily prudent man would do under all the circumstances and consequently presents a question solely for the jury, is, when applied to the case at bar, unsound in this: in railroad crossing cases the law has prescribed 'looking and listening' as precautions essential to 'ordinary care' or 'ordinary prudence.' Hence, as a matter of law, a man crossing a railroad track without 'looking and listening' cannot be held guiltless of negligence, except in rare cases and under extraordinary conditions,"

Under all the circumstances of this case, considering both the pleadings and the statement made, we are compelled to the conclusion that the deceased was guilty of contributory negligence, and that the appellants therefore cannot recover. We think that the negligence on the part of the railroad company was not so gross that it could be considered malicious, and that therefore the proximate cause of the accident was the negligence of the deceased.

MOUNT, C. J., RUDKIN, FULLERTON, and HADLEY, JJ., concur.

Root and Crow, JJ., took no part.

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[No. 6441. Decided December 6, 1906.]

W. F. BAILEY, *Respondent*, v. MUKILTEO LUMBER COMPANY,
Appellant.¹

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS. The doctrine of assumption of risks of danger from unsafety of the place, is not applicable to an unskilled man in a mill who is ordered from place to place, and from whom ready obedience is expected or necessary, unless the peril is so apparent that there can be no conflicting opinion between men of ordinary prudence.

SAME—CONTRIBUTORY NEGLIGENCE—INJURY TO SAWYER'S HELPER ON SPLITTER DECK. In an action for personal injuries sustained by a helper on a splitter deck while endeavoring, under directions from the sawyer, to dislodge a split log which had slid out of place, a nonsuit is proper on the ground of plaintiff's contributory negligence, where it appears that the injury was caused by the splitting of the log while endeavoring to dislodge it with a jack, that plaintiff had dogs which he might have used to prevent the splitting of the log, that logs frequently slid around in that way, and that he was familiar with the work and looked after the details.

Appeal from an order of the superior court for Snohomish county, Black, J., entered May 10, 1906, granting the plaintiff a new trial, after first granting the defendant's motion for a nonsuit, in an action by an employee for personal injuries sustained by the splitting of a log in a sawmill. Reversed.

Coolcy & Horan, and *Brownell & Coleman*, for appellant.

Hulbert & Bundy, and *McMurchie & Locke*, for respondent.

DUNBAR, J.—Undertaking to abbreviate the respondent's statement of this case, which we think is practically justified by the testimony, respondent was employed by appellant in its sawmill as helper on the splitter deck. "Splitter deck" is the term used for that portion of the mill in which logs too large for convenient handling in the mill proper are sawed

¹Reported in 87 Pac. 819.

lengthwise into quarters. The equipment of the splitter deck consisted of a saw carriage with a slot in the middle running through its length. Through this slot there ran a band saw. The operation of the splitter device consisted of the rolling of a log on the carriage so that its diameter was directly over the slot, and sawing the log lengthwise, cutting it into halves, with the exception that the saw was stopped twelve or eighteen inches from the end, leaving an unsawed length to hold the log together during further operations. The log was then turned and sawed again so that it would be quartered, again leaving an unsawed portion at the end. A chain was passed about the middle of the log, and by this means the log was rolled from the carriage through the open side of the mill and into a chute, thence into the water below.

The splitter deck at the time of respondent's injury was operated by one Fox (the sawyer) and respondent. At the time of the accident an unusually large log, with a crook or "belly," had been split into quarters. The chain was then passed under the log for the purpose of rolling it off the carriage and into the chute. By reason of the shape of the log, the chain could not be placed under its exact middle, but had been placed beneath one end. The drum was then started, but by reason of the sag in the log, it slued around, one end remaining on the carriage and the other lodging against a timber running along the outside edge of the deck. The deck at this point was thirty-two feet above the water, and there was no railing or guard upon its edge. Finding it impossible to roll the log out while in this position, it became necessary to straighten it so that it would be parallel with the carriage and with the edge of the deck. When the log became lodged, Fox, the sawyer, came down to examine the situation, and attempted to move the end of the log, which was resting on the carriage, with the chain, while the other end was held fast to the timber at the edge of the deck. After arranging the tackle, he went back to his station and tight-

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ened up on the chain. The only effect was to raise the outside end which was braced against the timber, so that it rested on the top of the timber. He again came down and said it would be necessary to take the log off with the jack. Respondent took the jack and started to place it against the end of the log, and Fox told him that that would split the log. Fox then took the jack and placed it against the side of the log, between the log and the outside edge of the deck, at a point two or three feet from the end. He then told respondent to operate the jack while he went up and loosened the chain, which the respondent did. When the log slipped off the timber, the jar caused one quarter to break away and spring out in such a manner as to knock the respondent off into the water below, thereby receiving the injury complained of. This statement is substantially testified to by the respondent, the only testimony being that of the respondent and of Fox, the sawyer, who was called by the respondent. At the close of the testimony the appellant made a formal motion for nonsuit. After considerable consideration by the court, the nonsuit was granted. A motion was afterwards made for a new trial, and the court determined that the nonsuit had been improperly granted, and granted respondent a new trial. From the order granting a new trial the defendant appealed.

The contention of the appellant is, that the respondent and Fox, the sawyer, were fellow servants; that the risk of the place in which he worked was assumed by the respondent, and that he was guilty of contributory negligence. Lengthy and elaborate arguments are made in the briefs of respective counsel on the subject of assumption of risk. The doctrine of assumption of risk is a difficult one to apply to an ordinary laborer in a mill or factory of any kind, for it must be considered with reference to another rule which is obviously a just rule, viz., that the servant when directed by the master to work in a certain place has a right to assume that he will not be exposed to unnecessary perils, or, in other words, that

such a direction or order implies an assurance of reasonable safety. 'This must be true if it is the duty of the master to furnish a reasonably safe place—a proposition which is undisputed—and the servant has a right to assume that the master will do his duty, which is equally well established. It must be apparent to any one who reflects upon the situation that operatives, in large concerns especially, are not expected by their employers, when they are ordered here and there, to spend any time in examining the safety of the place in which they are ordered to work, but are expected to obey with alacrity; and this ready obedience is necessary for the systematic operation of the business and frequently for the safety of others. In addition to this, it is a matter of common observation that the common unskilled man is not accredited with the capacity to determine the question of the safety of the place, but that such investigation and determination is made by or for the master when the general scheme or plan of operations is conceived and adopted. Any other theory in law would be harsh and unjust. Hence, the courts generally have decided that the servant will not be charged with assuming the risk of a place unless the peril is so apparent that there could be no conflicting opinion between men of ordinary prudence and understanding; and when this appears plainly, and then only, it becomes the duty of the court to hold that as a matter of law the risk was assumed.

But this case, it seems to us, falls more nearly within the rule of contributory negligence. It must be seen at a glance that the place where the respondent was operating the jack was a very dangerous place, and that if the log split and flew apart there would be no probable way by which the respondent could escape injury. He had worked on the splitter deck three weeks, and testified that he had learned all there was to learn about the work on the first day of his employment. The testimony shows that the respondent used some "dogs" which were furnished to him to keep the logs from splitting; that

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he knew their use and frequently used them for that purpose. He also testified that logs frequently slid around the way this log did. If the dogs had been used by him at this time it would have been impossible for the log to have split and the quarters to have detached themselves. He was familiar with the work and looked after the details or minutiae of the work, and having the appliances at hand and being familiar with their use, as he testified that he was, he saw fit to take chances on the splitting of the log, when he could have prevented it by a slight precaution. It is elementary that, if there are two ways in which work can be done, one a safe way and the other a dangerous way, and the operative chooses the dangerous instead of the safe way, he cannot complain if he is injured.

It is useless to discuss and analyze the multitude of cases that have been decided on this question by both this and other courts. In this case, having the means at hand to protect himself and neglecting to use such means, we think respondent cannot rightfully charge the disaster to his employer. The court in passing upon the question at the time the nonsuit was granted, said:

"The dangers, if any, were in the splitting of the log. That was a matter that was peculiarly, I think in this case, within the knowledge of the plaintiff. He was working with those logs; he knew the purpose of splitting the logs was so they would fall apart. He knew they were insecure. He was not directed as to the specific manner of doing the work. He had an opportunity of knowing that by putting dogs on the end, the splitting would be prevented, at least to a degree. He had the knowledge, and he had the right to put those dogs in."

This seems to us to be a fair presentation of the case, and we think the court was justified in granting the nonsuit asked for, and that it committed error in subsequently granting a new trial.

The judgment will therefore be reversed, with instructions to dismiss the case.

MOUNT, C. J., CROW, and RUDKIN, JJ., concur.

ROOT, J., concurs in the result.

HADLEY and FULLERTON, JJ., took no part.

[No. 6339. Decided December 7, 1906.]

GENEVA L. CARR *et al.*, *Respondents*, v. PAULA COHN,
Appellant.¹

PARTIES—TRUSTS—ACTIONS—REAL PARTY IN INTEREST—QUIETING TITLE. A person to whom a deed of land is conveyed without consideration, to hold the title for the grantors, is a trustee of an express trust, within Bal. Code, § 4828, and may sue to quiet title without joining the real owners.

APPEAL—REVIEW—FINDINGS. Findings of the trial court upon conflicting evidence, depending upon the credibility of the witnesses, will not be disturbed on appeal where the supreme court is unable to say that the findings are erroneous.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 14, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Richard Saxe Jones, for appellant.

Crary & Ogden and *J. B. Alexander*, for respondents.

ROOT, J.—This is an action brought by respondents to quiet title to certain land in King county. From a judgment in their favor this appeal is prosecuted.

The material facts are about as follows: The land in question was owned by one Thomas H. Clancy and wife. They made a deed of the same, without consideration, to respondent Geneva L. Carr, a sister of said Clancy. Said re-

¹Reported in 87 Pac. 926.

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spondent was to merely hold the title to the property for the benefit of Clancy and wife, and convey the same to whomsoever they might direct. Before this conveyance, Clancy and wife had executed a mortgage to one Grunbaum, who received the same as secretary of the Northern Liquor Company. This mortgage was to secure \$1,287 due said liquor company, and \$300 due to said Grunbaum. The mortgage was duly recorded in the office of the county auditor. Thereafter some negotiations were had with appellant relative to assigning said note and mortgage to her as security for a loan to the Northern Liquor Company of \$1,500. She claims she had theretofore made such a loan and advanced the money to the president of the company, one Rosenthal, who was her brother-in-law. Rosenthal testifies that he received said money as such officer of the company, and that the same was used for its use and benefit. Grunbaum, the secretary, and one Quient, a bookkeeper of the liquor company, both denied this in their testimony. A written assignment was made of the mortgage to appellant, and this assignment was filed for record in the office of the county auditor, at the request of Quient for Rosenthal, but instead of being indexed in the name of Grunbaum, it appeared in the index as "Greenbaum," and, by reason of the arrangement of said indices, the name occurred on a different page from where it would have appeared had it been indexed correctly. The note was endorsed by Grunbaum, but the endorsement was subsequently erased. Appellant claims that the note and mortgage and assignment thereof were delivered to Rosenthal to be kept for her, and that the same in some manner, unknown to her, found their way into the hands of Grunbaum. The latter and Quient say that the negotiations for the loan were never consummated; that the assignment was made out and executed, but was not intended to be effective until the money was received, at which time the assignment, note and mortgage were all to be delivered; that,

never having received the money, the liquor company never delivered the note and mortgage, and did not know that the assignment of mortgage had been delivered. Grunbaum swears that he kept the note in his possession always, with the exception of a short time when he was sick and Quient held it.

After all these transactions, Clancy and wife paid the amount due upon the note and mortgage to Grunbaum, and the latter acknowledged satisfaction and had the mortgage cancelled of record. In the meantime the liquor company had gone into the hands of a trustee, Grunbaum being such trustee. Clancy and wife claimed that they knew nothing about appellant having loaned any money, nor about an assignment of the note or mortgage, or of the latter being of record; and it is urged by respondents herein that, by reason of the incorrect indexing of the assignment of mortgage, the record thereof was no notice whatever to said mortgagors, or to any one, of the existence of said assignment.

At the threshold of the case appellant insists that this action cannot be maintained by respondents, for the reason that they are not the real parties in interest. We think this contention cannot be upheld. Bal. Code, § 4825 (P. C. § 253), is as follows:

“An executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.”

We think that these respondents were trustees of and for Clancy and wife within the meaning of this statute, and are consequently authorized to maintain an action of this character.

A question as to the sufficiency and effect of the recording and indexing of said assignment of mortgage is pre-

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sented, together with other questions; but in view of our conclusion upon the question of the making of a loan, it becomes unnecessary to pass upon these questions. From the foregoing statement it will be observed that the question of first importance is as to whether appellant made the loan as she claims. Upon this issue the evidence is flatly and irreconcilably conflicting, and mostly very unsatisfactory on both sides. The trial court found that appellant never made any loan. There is sufficient evidence, if believed, to support this finding. There is sufficient evidence, if believed, to support appellant's contention. It is a question of credibility of witnesses. We are not in as good a position as the trial court to judge of this. After a careful examination and consideration of all of the evidence, we are unable to say that the trial court reached an erroneous conclusion, or to satisfactorily arrive at one different. This being true, it follows that the judgment and decree of that court should be affirmed, and it is so ordered.

MOUNT, C. J., RUDKIN, FULLERTON, HADLEY, DUNBAR, and CROW, JJ., concur.

[No. 6328. Decided December 7, 1906.]

COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Appellant*,
v. ALBERT S. MOSS, *Respondent*, MARY E. STEVENS
et al., *Interveners*.¹

FORCIBLE ENTRY AND DETAINER—STATUTES—AMENDMENT—CONSTRUCTION. The amendatory act of 1905, p. 173, is not a re-enactment of the forcible entry and detainer act of 1891, p. 179, § 1, in view of the fact that different pleadings are provided for, no writ of restitution is authorized until final judgment, and different results follow failure to prove the entry, demand and refusal to surrender the premises.

FORCIBLE ENTRY AND DETAINER—GROUNDS OF ACTION—RIGHTS OF PLAINTIFF. In an action for forcible entry and detainer in which

¹Reported in 87 Pac. 951.

the complaint alleges causes of action under the general act, as amended by the Laws of 1905, in which the forcible entry or unlawful detainer must be proved, and under the act of 1891, under which the superior title prevails, the plaintiff must be held to have elected to proceed under the general act, where he sued out a writ of restitution and failed to set out an abstract of title, the abstract being required and the writ not authorized under the act of 1891.

FORCIBLE ENTRY AND DETAINER—STATUTES—CHANGE OF REMEDY. A defendant, guilty of forcible entry and detainer prior to the amendatory act of 1905, cannot claim that such act does not apply, since the act was only a change of remedies, affecting no vested right.

FORCIBLE ENTRY AND DETAINER—REMEDY—EJECTMENT. The general forcible entry and detainer act applies in many cases where ejectment was the remedy under former laws.

SAME—EVIDENCE—PRIMA FACIE CASE. Proof of plaintiff's title, that the defendant entered without permission or color of title, that notice to remove was given, and surrender refused, makes out a *prima facie* case of forcible entry and detainer under the act of 1905, precluding the granting of a nonsuit.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 16, 1906, granting a nonsuit, in an action of forcible entry and detainer. Reversed.

Piles, Howe & Farrell, and *Dallas V. Halverstadt*, for appellant.

Jerold Landon Finch, for respondent.

RUDKIN, J.—This was an action to recover possession of real property under the forcible entry and detainer laws of this state. The original complaint was filed on the 14th day of June, 1905, under the second subdivision of § 2 of the act of March 7, 1891, which provides as follows:

"Every person is guilty of a forcible detainer—. . . .
 "2. Who in the night time, or during the absence of the occupant of any real property, enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning

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of this subdivision is one who for the five days next preceding such unlawful entry was in the peaceable and undisturbed possession of such real property." Laws 1891, p. 179.

Afterwards an amended complaint was filed by leave of court, alleging not only a forcible detainer under the above subdivision, but also an unlawful detainer under § 1 of the act of March 7, 1891, Laws 1891, p. 212, and subdivision 6 of § 3 of the act of March 6, 1905; Laws 1905, p. 173. The former section provides:

"That any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the lands of another, and shall refuse to remove therefrom after three days' notice, shall be deemed guilty of unlawful detainer and may be removed from such lands."

The latter subdivision is as follows:

"A tenant of real property for a term less than life is guilty of unlawful detainer, either . . . (6) Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the land of another and who shall fail or refuse to remove therefrom after three days' notice, in writing, to be served in the manner provided in this act."

When taken in connection with the first part of the section, the language of the last subdivision is inaccurate and contradictory, but we think it is apparent that the legislature intended to declare that the persons therein named should be deemed guilty of unlawful detainer. Issue was joined on the amended complaint and a trial had. At the conclusion of the plaintiff's testimony, the court found that it was not in peaceable and undisturbed possession of the property in controversy for the five days next preceding the unlawful entry complained of, and granted a nonsuit. From this judgment the plaintiff has appealed.

If the peaceable and undisturbed possession of the appellant for the five days next preceding the entry of the respondent were the only issue in the case, we are not prepared

to say that there was error in the court's ruling, but inasmuch as that question may not arise on a retrial we will not decide it on this appeal. We are satisfied, however, that the appellant made out a *prima facie* case under other provisions of the statute, and that the respondent should have been put upon his defense. Counsel are not agreed as to the applicability of the amendatory act of 1905 to this case, nor as to the effect of that act upon a like provision found in § 1 of the act of 1891, *supra*.

The appellant contends that the amendatory act of 1905 is but a reenactment of § 1 of the act of 1891. The language of the two provisions is almost identical, and if § 1 of the act of 1891 stood alone, the argument would perhaps be unanswerable, but other provisions of that act must be taken into consideration in determining the question. Section 2 of the act of 1891 provides that there must be embodied in or appended to the complaint an abstract of the plaintiff's title and that the answer must state whether the defendant makes any claim of title, and if he makes no such claim, but claims the right of possession, the answer must state the grounds upon which the right of possession is claimed. Section 3 provides that if the answer denies the plaintiff's claim of ownership and states facts showing that the defendant has a lawful claim to the possession, the action shall stand for trial as one of ejectment. While, therefore, the general forcible entry and detainer statutes, as amended by the act of 1905, defines unlawful detainer in the language of the act of 1891, yet the procedure under the two acts is different. First, the pleadings are different. Under § 2 of the act of 1891 an abstract of the plaintiff's title must accompany the complaint, while under § 8 of the general forcible entry and detainer act the complaint need only be in writing and set forth the facts upon which the plaintiff seeks to recover, describing the property with reasonable certainty; second, under the act of 1891 no writ of restitution is authorized until after

final judgment; and third, under the forcible entry and detainer act as amended, the plaintiff must prove his cause of action as alleged; namely, that he is the owner of the property, that the defendant entered without permission and without having color of title thereto, that a proper notice to surrender possession was given and served, and that the defendant has failed to comply therewith. If he fails to prove the forcible entry or the forcible or unlawful detainer as alleged, he will fail in the action; while under the act of 1891 the only effect of such failure is to convert the action into one of ejectment where the superior right will prevail. For these reasons the act of 1905 is not a reenactment of § 1 of the act of 1891, but on the contrary, the general forcible entry and detainer act, as amended by the act of 1905 and the act of 1891 are independent enactments both of which are in full force and effect.

After the appellant served notice on the respondent to remove from the premises and the failure of the respondent to comply therewith, the latter was guilty of unlawful detainer, provided the appellant could prove the allegations of its complaint, and the remedy of the appellant was under the law in force at the time of the commencement of its action. It might proceed under the amendatory act of 1905, in which case it would be compelled to prove the forcible or unlawful detainer as alleged; or it might proceed under the act of 1891, under which the superior title would prevail. Having failed to append an abstract of its title to the complaint, and having sued out a writ of restitution before final judgment, it must be held to have elected to proceed under the general forcible entry and detainer act, and its rights will therefore be determined by that act. The respondent contends that his entry was made before the amendatory act took effect, and that such act cannot apply to him. The act is purely a remedial one, and the respondent has no vested

right in a remedy. So long as the remedy given satisfies the requirements of due process of law he has no just ground of complaint. In disposing of the case the court below expressed the opinion that the plaintiff's remedy was by ejectment, but it apparently overlooked the fact that unlawful detainer will lie under the above statutes in many cases where ejectment was the only remedy under former laws.

We will add, in conclusion, that the appellant alleged and proved its title to the property, that the respondent entered without permission and without having color of title thereto, that due notice to remove from the premises was given and that respondent failed to comply therewith. This made a *prima facie* case for the appellant, and granting of a nonsuit was error. Other parties intervened in the action, but their rights were not determined in the court below and will not be considered here. For the error in granting the nonsuit the judgment is reversed and a new trial ordered.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, DUNBAR, and CROW, JJ., concur.

[No. 6281. Decided December 7, 1906.]

WANDA MARKOWSKI, *Respondent*, v. MARTIN MARKOWSKI,
Appellant.¹

DIVORCE — CRUELTY — RENDERING LIFE BURDENSOME — FINDINGS — EVIDENCE. That the parties lived in a constant state of turmoil, and that the husband repeatedly, in the presence of strangers, accused the wife of infidelity without any justification, warrants a divorce on the ground of cruelty and personal indignities rendering life burdensome.

SAME — DIVISION OF PROPERTY — COMMUNITY PROPERTY — ALL AWARDED TO WIFE. Upon granting a divorce to the wife, the court may award all the community property, of the value of \$1,150, to the wife, where such provision is necessary for her support.

¹Reported in 87 Pac. 914.

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Opinion Per RUDKIN, J.

Appeal from a judgment of the superior court for King county, Hatch, J., entered January 2, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, granting a divorce and awarding property to the wife. Affirmed.

James McNeny, for appellant.

Aust & Terhune, for respondent.

RUDKIN, J.—This was an action for divorce on the ground of cruel treatment and personal indignities rendering life burdensome. The court below granted the divorce as prayed and awarded all of the community property, of the value of about \$1,150, to the plaintiff. From this judgment the defendant appeals.

The only questions raised on the appeal are questions of fact. It appears from the testimony that the parties lived in a state of turmoil during the greater part of their married life. The appellant declared in the presence of strangers that his home was like a brothel, and repeatedly accused the respondent of infidelity, even upon the witness stand. The appellant contends that the court misconstrued his language, that he was simply repeating what others had said, but the record does not bear him out in this. While the conduct of the respondent and her daughter may not have been above criticism, there is nothing in the record to warrant or justify the charges made by the appellant, and the animus of the witnesses called by him to sustain his charges was so apparent that the court evidently paid little heed to their testimony. The lower court concluded on the entire record that the allegations of cruel treatment and personal indignities were sustained, and we are satisfied with that conclusion. The ruling of the court in awarding all the community property to the respondent is also assigned as error. The property consisted of household goods of the value of about \$150, and a house and lot of the value of \$1,600 against which there was a

mortgage of \$600 payable in monthly installments of \$15 each. The appellant has steady employment, earning \$56 or \$57 per month, while the respondent is in ill health and has no earning capacity. Had the parties no community property, the court would have been called upon to make some provision for the support of the wife, and anything less than the court awarded would leave her a burden to the public or an object of charity to her friends.

We find no error in the record, and the judgment of the court below is affirmed.

MOUNT, C. J., ROOT, DUNBAR, and CROW, JJ., concur.

FULLERTON and HADLEY, JJ., took no part.

[No. 6352. Decided December 7, 1906.]

JOHN A. JUMP, *Respondent*, v. THE NORTH BRITISH &
MERCANTILE INSURANCE COMPANY OF LONDON
AND EDINBURGH, *Appellant*.¹

INSURANCE—LOSS BY FIRE—CONVEYANCE OF INSURED PROPERTY—PURCHASE-MONEY MORTGAGE BY VENDEE—CONDITIONS AND PROVISIONS OF POLICY—CONSTRUCTION. A policy of fire insurance providing that any change in interest title or possession of the property insured shall work a forfeiture, unless agreed to, is rendered void by an absolute sale of the property, with a purchase-money mortgage back to the insured to secure part of the price, without notice to the company; since the terms of the policy are unambiguous, and the mortgage back was a mere security retaining no title in the insured.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 28, 1906, upon findings in favor of plaintiff, after a trial on the merits before the court without a jury, in an action on a fire insurance policy. Reversed.

Harold Preston, for appellant.

Hartnett & Sheller, for respondent.

¹Reported in 87 Pac. 928.

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Opinion Per RUDKIN, J.

RUDKIN, J.—On the 18th day of February, 1904, the defendant company issued its policy of insurance to one Polly P. Belrood, whereby it insured a certain one and one-half story frame building in the sum of \$600 for a period of three years against loss or damage by fire. The policy contained the following provision, among others:

“This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void . . . if any change, other than by death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise”

On the 1st day of April, 1905, the plaintiff purchased and became the rightful owner of the property described in the policy, and on the same date an agreement continuing the insurance in his favor was added thereto. On the 9th day of April, 1905, the plaintiff conveyed the premises described in the policy to one Frank B. Thacker by good and sufficient deed, and on the same date Thacker executed and delivered to the plaintiff a purchase-money mortgage on the property in the sum of \$700. Whether or not this was the entire purchase price does not appear. Neither the defendant nor any of its agents had notice or knowledge of the transfer from the plaintiff to Thacker, or of the mortgage from Thacker to the plaintiff, until after the destruction of the premises by fire, and consent to such transfer was never endorsed on or appended to the policy. On the 9th day of August, 1905, the building described in the policy was destroyed by fire. On the 23d day of August, 1905, Thacker assigned to the plaintiff any interest he might have in the policy and the latter demanded payment of the amount of the policy from the insurance company, but payment was refused. The court found, in addition to the foregoing facts, that the plaintiff and Thacker were ranchers having no experience in

matters appertaining to insurance, and that at the time of the transfer to Thacker the plaintiff supposed that the policy was enforceable in his favor as mortgagee, in the event of loss. It was further stipulated by the parties that the plaintiff acted in good faith and without fraud in all matters relating to the insurance. On the foregoing facts the court below entered a judgment in favor of the plaintiff for the full amount of the policy, and the defendant appeals therefrom.

The only question presented on the appeal is whether the policy was avoided by the transfer from the respondent to Thacker, without the consent of the appellant company endorsed on or added to the policy. Policies of insurance are rightfully construed most strongly against the insurance companies under whose supervision they are prepared and executed, and if they contain contradictory provisions, some of which will work a forfeiture and others not, the latter will control. But while policies are construed strictly against the insurer, and while forfeitures are not favored in law, yet courts cannot make new contracts for parties nor grant relief where a forfeiture has accrued under the plain and unambiguous terms of the contract. As said by the court in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231,

"The rule is well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense."

An insurance company has the right to determine for itself whom it will insure and what interest it will insure, and to provide that any change in such interest without its consent will work a forfeiture of the policy. The policy before us provides in plain and unmistakable terms that any change in *interest, title or possession* of the subject-matter of insurance shall avoid the policy, unless otherwise provided by agreement

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endorsed thereon or added thereto. Has this provision been violated; or in other words, does an absolute conveyance of the subject of the insurance with a mortgage back to secure the purchase money in whole or in part work a change in interest, title or possession? A mortgage under our law is a mere lien or security for the payment of money and does not convey any title to the mortgagee. *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268. There has therefore been an entire change of interest and title. A fee simple title has been converted into a mere lien and the respondent is no longer the owner of the property at law or in equity. As said by the Court of Appeals of New York in a similar case:

"The insurers and insured may agree upon the terms of the contract and make its validity or continuance depend upon any terms and conditions, lawful in themselves, which they may deem reasonable or proper; and whether reasonable or unreasonable is for them, not for the courts, to determine. The title of the insured to the property at risk, and the measure and extent of his interest is, in the nature of things, a material subject of inquiry in the making of the contract. The insurers have a right to know to what extent the insured has the ability to protect or interest in protecting the property against the perils insured against, and whether other parties have insurable interests which may enable those interested to secure, in the aggregate, insurances in excess of the value of the property. The insurers certainly had the right to treat any change or alteration either of title or possession as material, and provide that such alteration or change should avoid the policy; and if the assured assented to the contract with this condition and limitation, effect must be given to the condition according to its terms. (*Davenport v. New England Ins. Co.*, 6 Cush. 340; *Edmands v. Mutual Safety F. Ins. Co.*, 1 Allen 311.) As well the insured as the insurers are interested in the faithful observance of the conditions of the contract. The premium demanded is essentially regulated by the conditions of the contract and the risk assumed, and if conditions deemed material by the insurers are disregarded by the insured or nullified by the courts, the insurers will be made to suffer in the increased

cost of insurance, as all will be made to pay for absolute and extreme risks."

"While the interests of the owner in fee and the mortgagee are both insurable, and each may have independent insurances, each covering his own interest, the interests are entirely distinct, and the rights and obligations of the parties to the contract different. Had the plaintiff been insured as mortgagee, the insurer, upon payment of a loss, would be entitled to be subrogated to the rights of the mortgagee against the mortgagor. The distinction between an issue based on a denial of an insurable interest, and the question whether there had been an alienation or change of title, was recognized in *Orrell v. Hampden F. Ins. Co.* (13 Gray. 431). A change of title valid as between the parties was treated as a breach of the condition, but there no alienation was proved. A mortgage is not an alienation of the property mortgaged; but when the condition of the policy was that 'all alienations and alterations in the ownership,' etc., of the property should make void the policy, a mortgage was held to be an alteration of the ownership and to make void the insurance. (*Edmonds v. Mut. Safety F. Ins. Co.*, 1 Allen 311.) The court thought it material to the insurers to know who had title to or interest in the property insured. The question was directly before this court in *Springfield F. & M. Ins. Co. v. Allen* (43 N. Y., 389), and it was there held without dissent, following the current of authority, and giving the policy a fair and reasonable interpretation that, the policy providing it should be void upon 'any change of title in the property insured,' it became void by a transfer of the premises by the owner although the interest of the assured, a mortgagee, was not changed subsequent to the date of the policy. When the insurance was to the owner of the property, loss, if any, payable to a mortgagee, with a similar condition as in this case, an alienation of the property by the mortgagor was adjudged to make void the policy. (*Grosvenor v. Atlantic F. Ins. Co. of Brooklyn*, 17 N. Y. 391.)

"The condition is not capable of two readings, and the courts have no right under the pretense of interpretation to nullify a material provision inserted for the reasonable protection of the insurers, and thus exercise a dispensing power in favor of the insured. It cannot be said that a

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conveyance of the fee, and the taking back a mortgage for the purchase-money, is not as well a sale or transfer as a change of title. It is sufficient, to put an end to the policy, that there has been a change in the title; and no one can say that a conveyance of the fee, and substituting the interest of a mortgagee in the insured, is not a substantial change in the title. But the sale or transfer of the property was complete and absolute, and the retaining a lien for the purchase-money, either in the form of a mortgage or otherwise, did not change the character or effect of the conveyance. The fact that, to preserve equities and exclude liens which might otherwise defeat purchase-money liens, courts regard a deed of conveyance and purchase-money mortgage as simultaneous, and the rights of the parties as if the title to the amount of the mortgage interest had never passed out of the *grantor*, do not aid in construing this contract, or tend to establish the claim of the respondent that there has been no transfer of the property." *Savage v. Howard Insurance Co.*, 52 N. Y. 502, 11 Am. Rep. 741.

See, also, *Northern Assurance Co. v. City Savings Bank*, 18 Tex. Civ. App. 721, 45 S. W. 737; *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608; 13 Am. & Eng. Ency. Law (2d ed.), 241-244, and cases cited.

Cases holding that a conveyance and mortgage back do not work a forfeiture of a contract of insurance will be found in general to be based upon different provisions in the policy under consideration, or from jurisdictions where a mortgage is held to be a conveyance leaving no interest in the mortgagor except a mere right of redemption. We are therefore of opinion that the policy in suit was avoided by a change of title and interest in the subject of insurance, and the judgment is accordingly reversed, with directions to dismiss the action.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, DUNBAR, and CROW, JJ., concur.

[No. 6174. Decided December 8, 1906.]

THE STATE OF WASHINGTON, *Appellant*, v. R. K. TIFFANY
et al., *Respondents*.¹

CRIMINAL LAW—MALICIOUS TRESPASS—INFORMATION—STATUTES—CONSTRUCTION. In a prosecution for the statutory offense of "wilfully or maliciously" making an aperture in a dam for agricultural purposes, it is not necessary to charge that the act was maliciously done; since "or" cannot be construed to mean "and" in this connection.

SAME. An information in a prosecution for making an aperture in a dam used for agricultural purposes is sufficient where it charges that the dam was used for irrigation purposes, as the terms are synonymous.

SAME. A dam constructed to conduct water for irrigation purposes comes within the statute against malicious trespass to any structure to conduct water for agricultural purposes.

Appeal from an order of the superior court for Kittitas county, Rigg, J., entered December 19, 1905, discharging the defendants, upon sustaining a motion in arrest of judgment after verdict, in a prosecution for the crime of malicious trespass. Reversed.

Austin Mires and *W. H. Bogle*, for appellant.

Ira P. Englehart and *E. F. Blaine*, for respondents.

RUDKIN, J.—This is an appeal from an order sustaining a motion in arrest of judgment after verdict, and discharging the defendants on the ground that the facts charged in the information do not constitute a crime or misdemeanor. The information, omitting formal parts, is as follows:

"That they, the said R. K. Tiffany and J. A. Driscoll, in Kittitas county, state of Washington, on or about the seventeenth day of August, 1905, then and there being, did then and there unlawfully and wilfully make and cause to be made

¹Reported in 87 Pac. 932.

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an aperture in a structure known as a dam, erected in and across the Cle Elum river, at the foot of Cle Elum lake, for storing and conducting water for irrigation purposes, by unlawfully and wilfully then and there placing and exploding powder known as dynamite, with intent then and there to injure and destroy said structure. The said structure then and there being the property of the Union Gap Irrigation Company, a corporation."

The information was filed under Bal. Code, § 7154 (P. C. § 1627). The provisions of that section, so far as material to the present inquiry, are as follows:

"Every person who shall wilfully or maliciously, make or cause to be made, any aperture in any milldam, canal, flume, aqueduct, reservoir, embankment, or other structure erected to conduct water for agricultural purposes, with intent to injure or destroy the same, shall, upon conviction thereof, be punished, etc."

This being a prosecution for a statutory crime, the information need only charge the crime in the language of the statute, and there is little room for argument or discussion, except to compare the language of the information with the language of the statute defining the crime. After such comparison, we fail to see wherein the information is deficient.

The first contention of the respondents is that the words "wilfully or maliciously" in the statute should be read "wilfully and maliciously," and that the information is defective because it does not charge that the act complained of was committed maliciously.

"The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless adequate grounds are found, either in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does

not give the real intention of the legislature." Endlich, Interpretation of Statutes, § 2.

No doubt *or* is sometimes construed to mean *and*, and *vice versa*, in statutes, wills, and contracts. Thus, in *State v. Mitchell*, 5 Ired. (N. C.) 350, *or* was construed to mean *and* in a statute providing for the punishment of any person who should wilfully *or* maliciously burn the state-house or any of the public offices of the state, or any courthouse, jail, etc. In *Rolland v. Commonwealth*, 82 Pa. St. 306, *or* was construed to mean *and* in a statute defining the crime of burglary as the breaking *or* entering of a dwelling house. In the former case the original enactment contained the word *and*; but "When the acts of the General Assembly came to be revised, by some mistake the word *or* was inserted in the statute, in the place of the conjunction *and*." In the latter case it was necessary to construe the word *or* to mean *and*, otherwise the section in which the word appeared would define the same crime as another section of the statute to which a different penalty was attached.

But the plain language of a statute can only be disregarded, and this exceptional rule of construction can only be resorted to, where the act itself furnishes cogent proof of the legislative error. It is argued in this case that, because the legislature declared that certain acts specified in the first part of the section must be committed wilfully *and* maliciously, therefore, the use of the words wilfully *or* maliciously in the latter part of the section in reference to other acts is an apparent error. It might be urged with equal force that, since the legislature changed the phraseology in the latter part of the section, the change was made advisedly and for a purpose. We are satisfied that the act under consideration contains no such evidence of error or mistake as would warrant us in disregarding its plain language. The word *or* cannot be construed to mean *and* where the words, wilfully *or* wantonly, or wilfully, maliciously *or* wantonly, are used in defining a

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crime. *Rountree v. The State*, 10 Tex. App. 110; *Werner v. State*, 93 Wis. 266, 67 N. W. 417.

It is next contended that the information charges that the dam or structure was erected to conduct water for *irrigation* purposes, whereas the statute uses the term *agricultural* purposes. Regardless of technical definitions, the phrase "irrigation purposes," or "purposes of irrigation" is a common expression in the legislation of this state, and has acquired a well defined meaning, which is synonymous with *agricultural* purposes; or, at least, the former is included within the latter.

Lastly, it is contended that the dam or structure described in the information is not one of the structures mentioned in the statute. If a dam erected to conduct water for irrigation purposes is not one of the structures mentioned in the statute, it is at least a structure of a like kind, under the rule of *ejusdem generis*, and comes within the purview of the statute.

The information is sufficient in law, and the judgment of the court below is therefore reversed and the cause remanded for further proceedings.

MOUNT, C. J., HADLEY, FULLERTON, and CROW, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

[No. 6288. Decided December 8, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM
BELKNAP, *Appellant*.¹

CRIMINAL LAW—TRIAL—SEDUCTION—IMPROPER CROSS-EXAMINATION. In a prosecution for seduction, in which three witnesses for the defendant testified that they previously had had sexual intercourse with the prosecutrix, it is an abuse of discretion and prejudicial error, depriving the defendant of a fair trial, to permit cross-examination to proceed to the extent of asking whether one of such witnesses had broken an engagement with another woman, whether one of them had been accused of bastardy, and allowing questions implying that they had had sexual intercourse with other women.

¹Reported in 87 Pac. 934.

TRIAL—INSTRUCTIONS—COMMENT ON THE EVIDENCE. An instruction assuming as a fact that defendant had fled is not an unlawful comment on the evidence, where the defendant admitted and himself testified to the fact.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered March 28, 1906, upon a trial and conviction of the crime of seduction. Reversed.

Welsh & Welsh, for appellant.

H. W. B. Hewen (*William G. Crosby*, of counsel), for respondent.

RUDKIN, J.—This was a prosecution for the crime of seduction, and from a judgment of conviction, the present appeal is prosecuted. Errors are assigned in the admission of testimony, in the giving of instructions, and in the overruling of a motion for a new trial. Columbus Stevens, Frank Brooks, and William Chapman were called as witnesses on the part of the appellant, and each testified, on his direct examination, that he had had sexual intercourse with the prosecuting witness prior to the date of the seduction alleged in the information. The following proceedings occurred on the cross-examination of these witnesses.

First, the witness Stevens:

“Q. Do you know a girl by the name of Carrie Grader-son; engaged to be married to her on the 11th? Objected to as being immaterial. Objection overruled by the court, to which ruling the defendant excepts. A. No, sir, I was not. Q. Engaged to her? A. I was, yes. Q. Date fixed? A. Not exactly. Q. Wasn't the date fixed for the 11th of July? Mr. Welsh: We object to this class of testimony as being entirely immaterial. Objection overruled by the court, to which defendant excepts. Q. You say the date was not fixed for the marriage? Defendant objects on the grounds that it is immaterial; objection overruled. Defendant excepts. A. Not exactly. No. Q. What do you mean by 'not exactly?' Defendant objects to the testimony as being immaterial, irrelevant, and not proper cross-examination. Objection overruled

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by the court, to which defendant excepts. Q. What do you mean by saying that the date was 'not exactly' fixed? Same objection. Same ruling, to which defendant excepts. A. We were engaged to be married, but there hadn't been no exact time. Q. How long had you been at Gile's ranch before Carrie Graderson came over there? A. Something like a month. Q. Came over there to see why you wasn't going to marry her? Defendant objects on grounds that it is immaterial. Objection overruled and defendant excepts. A. She was wanting to go to California. She wanted to get married before she went down. I wasn't ready yet, and told the girl that I wasn't going to get married yet, and she could go to California. Q. She insisted it had been fixed for the 11th of July? Defendant objects on the grounds that it is immaterial. Objection overruled. Defendant excepts. A. No. Q. She wanted you to marry her? Same objection by defendant; same ruling. Defendant excepts. A. No. Q. You didn't and never married her? Same objection by defendant. Same ruling. Defendant excepts. A. No, never have. Q. You went off and left her at Oregon City without saying where you were going. Defendant objects on grounds that it is immaterial. Objection overruled. Defendant excepts. A. Yes, sir, I did."

Second, the witness Brooks:

"Q. Was she the first woman you ever had sexual intercourse with? Mr. Welsh: Objected to as being immaterial. Objection overruled by the court, to which defendant excepts. A. No, sir, it was not. Q. With whom had you had sexual intercourse prior to having sexual intercourse with Miss Hughes? Objected to as being immaterial and irrelevant. Objection overruled by the court. Defendant excepts. A. Well, I don't know who it was; people of that class do not usually go under their right names. Q. Was there no woman with whom you had sexual intercourse prior to Miss Hughes, whose right name you do know? Mr. Welsh: Objected to as immaterial, irrelevant and improper cross-examination. The court: He can answer if he has no objection himself, but he does not have to answer unless he wants to. Defendant excepts. No answer. Q. Ever live in Willapa Valley? A. Yes, I have. Q. Have sexual intercourse with a girl living up

there? Mr. Welsh: Objected to as immaterial, irrelevant, and improper cross-examination. The Court: The objection is overruled. He can use his pleasure about answering. Defendant objects. No answer. Q. Did you have sexual intercourse with a young girl living in Willapa Valley, from whom the birth of an illegitimate child resulted at any time prior to this? Mr. Welsh: Same objection. The Court: Overruled. Leave it to the witness to answer as he wants to. Defendant excepts. A. No, sir, I never did. Q. Have you ever been charged or is it claimed by any girl living in this county, that she has an illegitimate child of which you are the father? Mr. Welsh: Objected to as immaterial, irrelevant, and improper cross-examination. The Court: Overruled. Leave it to the witness to decide whether he wants to answer. Defendant excepts. A. No, sir, there is no girl, not to my knowledge. It is a sad mistake if there is. Q. Is there any girl claiming that you are the father of an illegitimate child, that is not now living? Mr. Welsh: Same objection. Same ruling. Defendant excepts. A. Not to my knowledge. I don't think there is."

Third, the witness Chapman:

"Q. You say in the summer of 1904 you had intercourse with Miss Hughes; had you had sexual intercourse with any other girl before that? Objected to as immaterial and improper cross-examination. Objection overruled by the court, to which defendant excepts. A. Yes, I did. Q. Who was it? Objected to as being immaterial, irrelevant, and improper cross-examination. The Court. The objection is overruled. but the witness may answer or not as he likes. The defendant excepts. A. I do not care to answer that question. Q. Did you, at any time prior to these acts with Miss Hughes that you have testified to, have sexual intercourse with a girl named [name withheld]? Objected to as irrelevant, incompetent, immaterial and improper cross-examination. The Court: Overruled. Let the witness decide for himself whether he wants to answer that question. A. I do not care to answer that question."

Courtrooms are bad enough when their proceedings are conducted under proper restrictions, and they should not be made schools for scandal. The extent to which cross-exami-

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nations will be permitted is no doubt in a large measure in the discretion of the trial court; and it is difficult to draw the line as to where legal discretion as to the admission or exclusion of such testimony commences and where it ends; but we have no hesitation in saying that sound judicial discretion was abused in this case. Whether one of the witnesses was engaged to another woman, whether the engagement was broken off, and the circumstances surrounding such engagement, were questions wholly foreign to the issues in this case. The relations of the witnesses with other women, and whether one of them had been accused of or was guilty of bastardy, falls within the same category. Wharton's Criminal Evidence states the rule thus:

"Every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers; and aside from this general sanction, if witnesses were to be compelled to answer fishing questions as to any scandals in their past lives, the witness-box would become itself a scandal which no civilized community would tolerate. Allow unqualified liberty in this respect, and no witness, no matter how respectable, could be sworn, without being required, if it should please the opposing party, to have even the most remote passages of his past life explored, and without being himself compelled to narrate any events in that life which were discreditable; no matter for how long a time such discredit had been atoned for by penitence, by reformation, and by correction of the wrong. Such inquisitions, however, the courts have refused to permit . . ." Wharton, Criminal Evidence (9th ed.), § 472.

In *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311, the court said:

"The proposition that no witness has a right to complain of an opportunity to vindicate his integrity by his own oath, is plausible and specious, but illusory. It ignores the indignity of a degrading imputation, when there is nothing in the circumstances of the case to justify it. It ignores, too, the humiliation of public arraignment by an irresponsible ac-

cuser, misled by an angry client, and shielded by professional privilege. Few men of character, or women of honor, could suppress, even on the witness stand, the spirit of just resentment which such an examination, on points alien to the case, would naturally tend to arouse. The indignation with which sudden and unworthy imputations are repelled, often leads to injurious misconstruction. A question, which it is alike degrading to answer or decline to answer, should never be put, unless, in the judgment of the court, it is likely to promote the ends of justice. A rule which would license indiscriminate assaults on private character, under the forms of law, would contribute little to the development of truth, and still less to the furtherance of justice. It would tend neither to elevate the dignity of our tribunals, nor to inspire reverence for our system of jurisprudence."

In *Elliott v. Boyles*, 31 Pa. St. 65, the court said:

"It would be absolutely intolerable that a man, by being brought into court as a witness, should be bound to submit all the acts of his life to the exposure of malice, under the pretense of testing his credibility. If such were the test, courts would often present in language and temper, scenes of unmitigated ruffianism, and the means of enforcing law and order in society would be denounced as sources of corruption and disorder."

In *Buel v. State*, 104 Wis. 132, 80 N. W. 78, the court said:

"The administration of justice requires that trial courts shall not have their discretionary powers circumscribed by any very narrow boundaries, but does require that such limit shall be placed upon them as will prevent any mere prejudice to be built up in the course of a trial, especially in an important case like this, which will tend to influence a jury to determine the facts otherwise than from the legitimate evidence produced in court. It seems clear that such limit was passed in allowing the cross-examination in question, to the extent to which it was carried. . . . A reading of the questions under consideration leads to the irresistible conclusion that no idea was entertained by the cross-examiner that proof would be elicited of the matters implied by them. We say 'implied' because the asking of the direct questions in the

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manner in which they were asked implied to some degree that the examiner was possessed of information upon which the questions were based, and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions was not and could not have been removed entirely from the minds of the jurors. It is useless to refer to authorities on this subject. Text writers and adjudged cases are generally in accord that, so long as the cross-examination is carried on with reasonable fairness, to test the credibility of the witness, it is permissible, but the moment questions are asked concerning facts touching the witness' character, which are irrelevant to the facts in issue, for any other purpose than to affect his credibility or which manifestly do not bear on the subject of credibility, the right of cross-examination is abused, and on objection should be restrained within legitimate limits."

Nor is it material that the witnesses were not required to answer the questions. As said by the court in *Buel v. State*, *supra*, the questions themselves implied to some degree that the examiner was possessed of information upon which the questions were based, and neither an answer nor a refusal to answer could remove the insinuation from the minds of the jurors. The privilege is not that of the witness alone. If the cross-examination is so conducted as to deprive the appellant of a fair and impartial trial, he has just grounds to complain, and we think that such is the case before us.

After the appellant rested, the court reopened the case and permitted the respondent to offer further testimony in chief. This ruling is assigned as error; but inasmuch as the questions will not arise on a retrial, we will not consider it on this appeal. Error is assigned in the giving of the following instruction:

"The jury are authorized to consider the flight of the defendant after a warrant was issued for his arrest, or after he learned that a prosecution was to be instituted against him, and it is for them to say just how much weight, if any, they shall give that fact as an evidence of guilt."

If the question of flight was a controverted one on the trial,

this was a clear comment on the facts, but such was not the case. The appellant himself testified that he saw the deputy sheriff coming, knew what he was coming for, and fled. While courts should be cautious in assuming facts as proven in a criminal case, yet where a defendant himself testifies to a fact, he cannot complain if the court assumes his testimony to be true in its charge to the jury. *People v. Phillips*, 70 Cal. 61, 11 Pac. 493; *State v. Archer*, 73 Iowa 320, 35 N. W. 241; *State v. Day*, 79 Maine 120, 8 Atl. 544; *State v. Angel*, 29 N. C. 27.

We find no error in the other rulings complained of, but for the error in admitting evidence on cross-examination, the judgment is reversed and a new trial ordered.

MOUNT, C. J., ROOT, DUNBAR, and CROW, JJ., concur.

FULLERTON and HADLEY, JJ., took no part.

[No. 6344. Decided December 8, 1906.]

FREDERICK FALK, *Respondent*, v. THE A. F. SCHMITZ ALASKA
DREDGING & MINING COMPANY, *Appellant*.¹

CORPORATIONS—STOCKHOLDERS—ASSIGNMENT OF STOCK—BREACH OF AGREEMENT TO PAY FOR STOCK—RIGHT OF TRUSTEES TO CANCEL STOCK CERTIFICATE. Where stock in a corporation is assigned to the owner, and a certificate duly issued to another, who thereupon becomes the owner thereof, the trustees have no power to forfeit and cancel the stock for the failure of the vendor stockholder to pay the company for the stock, or for failure of the vendee to perform any contract he may have had with his vendor.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 17, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action brought by a stockholder of a corporation to set aside a resolution cancelling a stock

¹Reported in 87 Pac. 927.

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certificate and to compel the reissuance of the stock. Affirmed.

Fred Page-Tustin and Arthur & Hutchinson, for appellant.

Henry S. Noon and James E. Bradford, for respondent.

RUDKIN, J. — Articles of incorporation of the A. F. Schmitz Alaska Dredging & Mining Company were filed in the office of the secretary of state on the 11th day of July, 1903. On the 7th day of August, 1903, one A. F. Schmitz subscribed for the entire capital stock of the company, divided into 500,000 shares, of the par value of \$1.00 each, and agreed to pay therefor by transferring to the company his interest in certain mining claims and a dredging contract, and placing 100,000 shares of the stock in the treasury of the company, to be disposed of to raise funds to carry on the business of the company. At the first meeting of the trustees of the company held on the following day a resolution was adopted, reciting the stock subscription as above set forth and accepting the same, and the president and secretary were authorized and directed to issue the entire capital stock to Schmitz as fully paid up, and to receive from him the 100,000 shares in the name of the treasurer, to be disposed of under such regulations as the trustees might adopt. At the same time a certificate for the 500,000 shares was regularly issued to Schmitz, who receipted for the same, and immediately assigned 100,000 shares thereof to the treasurer of the company as per the subscription agreement, 80,000 shares to one B. B. McCann, 80,000 to the plaintiff Falk, and 150,000 shares to himself as trustee. A certificate for the 80,000 shares thus assigned to the plaintiff was thereupon issued to him. He immediately receipted the secretary for the certificate and turned it over to the treasurer of the company under the following provision of the by-laws: "The company will not recognize or accept any orders for stock issued by any member of the company, against any stock pooled by said

members, and none of the pooled stock shall be released until the treasury stock is all sold or the company becomes a dividend-payer," taking his receipt therefor.

Soon after this the plaintiff went to Europe and did not return to Seattle until the month of September, 1904. In the meantime, a new board of trustees, appointed by Schmitz, met, adopted a resolution reciting that the plaintiff had agreed to pay the company a certain unnamed sum of money for the 80,000 shares of promotion stock, and that he had not paid the same, and ordered the cancellation of the stock certificate theretofore issued to the plaintiff. This action was brought to vacate and set aside the resolution cancelling the stock certificate, and to compel the proper officers of the company to reissue the stock to the plaintiff. The court below found in favor of the plaintiff, and the defendant appeals.

Many important questions of corporation law are discussed in the briefs, but there is little room for their application in this case. It is conceded, and must be conceded, that Schmitz subscribed for and became the unqualified owner of the entire capital stock of the company. He assigned 80,000 shares of this stock to the respondent, who received a certificate therefor. The title of Schmitz is not questioned, but it is claimed that the respondent failed to comply with some collateral agreement to sell the treasury stock, or furnish money from his own funds to meet certain obligations of the company. Let us concede this to be true. If such agreement was made with the company, it could not forfeit the stock for a mere breach of this contract. If, on the other hand, the agreement was with Schmitz—which seems to be the case—the company could not forfeit the stock of one stockholder because of his failure to fulfill his agreement with another. The entire defense is built upon the theory that the stock certificate in controversy was never delivered to the respondent, and that a certain sum of money was to be paid before such delivery. But the records of the appellant corporation and all

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Citations of Counsel.

the testimony show the contrary. The respondent was, therefore, the owner of the stock, regardless of any agreement he may have made with the corporation, its promoters, or stockholders, and the remedy for the violation of any such agreement was not by a forfeiture of the stock. The action of the board of trustees was without warrant or authority of law, and the judgment of the court below is accordingly affirmed.

MOUNT, C. J., ROOT, DUNBAR, and CROW, JJ., concur.

FULLERTON and HADLEY, JJ., took no part.

[No. 6377. Decided December 8, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. PHILIP, AN
INDIAN, *Appellant*.¹

COURT COMMISSIONERS—POWERS—COURTS—JUDGE AT CHAMBERS—CRIMINAL LAW—TRIAL. A court commissioner has no power to take the arraignment of a prisoner, accept a plea of guilty, and render judgment, under Const., art. 4, § 23, conferring upon them the power of a judge at chambers; since a judge at chambers, under Laws 1891, p. 91, does not have the power of a court, and Bal. Code, §§ 6884, 6901, and 6975, require arraignment, plea of guilty, and sentence, to be in open court.

Appeal from a judgment of the superior court for Okanogan county, Honorable Frank H. Foster, court commissioner, entered July 16, 1906, upon a plea of guilty to an information charging the crime of horse stealing. Reversed.

Perry D. Smith, for appellant, cited: *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; Chitty, General Practice, 19; *Pittsburg etc. R. Co. v. Hurd*, 17 Ohio St. 144; *Church of Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *United States v. Trans-Missouri Freight Ass'n*, 58 Fed. 58; *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21; *Gere v. Weed*, 3 Minn. 352.

¹Reported in 87 Pac. 955.

RUDKIN, J.—The defendant in this action was arraigned before a court commissioner, appointed by the judge of the superior court for Okanogan county, on a charge of horse stealing. He entered a plea of guilty to the information filed against him, and was thereupon sentenced to imprisonment in the penitentiary at hard labor for the term of one year. From this judgment and sentence the present appeal is prosecuted.

The only question discussed in the briefs is this: Under the constitution and laws of this state, has a court commissioner power to take the arraignment of a prisoner charged with a felony, accept a plea of guilty, and render judgment thereon? The constitutional provision relating to court commissioners is as follows:

“There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions, and to perform such other business connected with the administration of justice as may be prescribed by law.” Constitution, article 4, § 23.

An act was approved March 19, 1895, providing for the appointment of court commissioners, and defining their powers and duties (Laws of 1895, page 164); but inasmuch as that act does not attempt to confer upon court commissioners any such powers as were exercised in this case, its provisions need not be further considered.

Under our present system of courts there seems to be a confusion of ideas as to the powers or functions of superior judges at chambers. In *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397, the court used the following language:

“Under our present system, when an act of a judicial nature is performed by a judge, it is, in contemplation of law, done in open court, although the act may in reality be done in the private room or office of the judge.”

If the above is a correct statement of law, and our constitution means what it says when it declares that court commissioners have authority to perform like duties as a judge of the superior court at chambers, it is scarcely necessary to add that court commissioners are entirely eliminated from our judicial system. Realizing this, the court intimated, rather than decided, in the above case, that court commissioners have like powers as were exercised by territorial district judges at chambers at the time of the adoption of the state constitution. This is certainly a strained construction of very plain language, and we cannot believe that the framers of the constitution intended to define the powers of important judicial officers by reference to the legislation of a government which was about to pass out of existence forever. There may be little necessity for conferring any considerable power on a judge at chambers, when the court over which he presides is always open, yet the fact that a court is always open is not necessarily incompatible with the exercise of certain judicial functions by the judge of that court at chambers; at least the framers of the constitution did not so consider it. Nor has the legislature. Section 5 of the act of February 26, 1891, defines the powers of superior judges at chambers as follows:

“A judge may exercise out of court all the powers expressly conferred upon a judge as contradistinguished from a court and not otherwise.” Laws of 1891, page 91.

Here is a legislative recognition and definition of the powers of superior judges at chambers, and we see no reason why it is not controlling. In the case before us it matters little whether the powers of court commissioners are regulated by § 2138 of the Code of 1881, defining the powers of territorial district judges at chambers, or by the act of 1891, *supra*, defining the powers of superior judges at chambers, or by the act of 1895, *supra*, providing for the appointment of court commissioners and defining their powers and duties.

Under Bal. Code, § 6884 (P. C. § 2142), a defendant must be arraigned before the court. Under § 6901 (P. C. § 2154), "The plea of guilty can only be put in by the defendant himself in open court." Under § 6975 (P. C. § 2211), the court must render judgment where the defendant is found guilty. In the face of these mandatory provisions of the statute, judges at chambers and court commissioners are alike powerless.

The judgment below is therefore reversed, and the cause is remanded for further proceedings.

MOUNT, C. J., ROOT, HADLEY, DUNBAR, and CROW, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 6341. Decided December 8, 1906.]

CHESTER D. WRIGHT *et al.*, *Appellants*, v. MARION JESSUP,
Respondent.¹

LIS PENDENS—NOTICE—EFFECT ON PRIOR UNRECORDED INTEREST. The filing of a *lis pendens*, in an action to foreclose a street assessment lien, and the subsequent judgment and sale, cuts off any interest of the parties to the action, and also of one claiming under a party by an unrecorded assignment of a sheriff's certificate of sale, whether the purchaser at the foreclosure sale had notice of such assignment or not, when such assignment was inferior to the lien foreclosed; hence a quitclaim deed from such party or assignee, made after judgment, conveys no title.

EJECTMENT—PLAINTIFF'S TITLE—TITLE IN THIRD PERSON. In ejectment it is of no avail for plaintiffs, on failure to prove title in themselves, to claim that defendant's title by foreclosure is defective for failure to join a necessary party, a third person, who accordingly held the title.

TAXATION. Parties claiming adversely may strengthen their titles by obtaining a tax or street assessment deed.

Appeal from a judgment of the superior court for Whatcom county, Joiner, J., entered March 21, 1906, upon find-

¹Reported in 87 Pac. 930.

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ings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

Fairchild & Bruce, for appellants.

Hardin & Hurlbut and *Black, Kindall & Kenyon*, for respondent.

RUDKIN, J.—This was an action of ejectment to recover possession of a certain lot in the city of Bellingham. From a judgment in favor of the defendant, the plaintiffs have appealed.

The material facts are as follows: On and prior to the 13th day of May, 1892, Charles G. Hopkins and wife were the owners of lot 12, of block 13, of the city of Whatcom, now a part of the city of Bellingham. On the 20th day of June, 1894, J. W. Emerson recovered judgment against Hopkins and wife, in the superior court of Whatcom county, for the sum of \$75, together with costs and attorney's fees. On the 19th day of June, 1895, Hopkins and wife conveyed the premises by warranty deed to Henry Herrman. On November 16, 1896, J. S. Emerson commenced an action in the superior court of Whatcom county against Henry Herrman, and sued out a writ of attachment, under which the premises were levied upon and attached. On February 23, 1897, judgment was rendered in the attachment suit, and the attached premises ordered sold. The sale under execution took place on the 3d day of April, 1897, J. S. Emerson becoming the purchaser, and receiving a certificate of purchase from the sheriff. On the same day, Emerson assigned all his right, title, and interest in the certificate of purchase and the property therein described to the Emerson Investment Company, a corporation, by written endorsement on the back of the certificate. On the 4th day of June, 1897, J. S. and J. W. Emerson conveyed the premises to the Emerson Investment Company by quitclaim deed. On October 25, 1897, the Emerson

Investment Company assigned to Elizabeth Jane Herrman the above certificate of purchase, with all its interest in the premises therein described, by written endorsement on the back of the certificate.

On the 28th day of March, 1900, the city of New Whatcom commenced an action in the superior court of Whatcom county to foreclose a lien for a street grade assessment against the premises, in which action the Emerson Investment Company, Henry Herrman, and others, were made defendants; and at the time of filing the complaint, a notice of *lis pendens* was filed in the office of the county auditor of Whatcom county. Elizabeth Jane Herrman and H. P. Herrman, her husband, were not made parties to this action; but at the time of the commencement of the action and at the time of filing the notice of *lis pendens*, the records of the auditor's office in Whatcom county disclosed no interest in the premises in either Elizabeth Jane Herrman or her husband. The city recovered judgment in the foreclosure suit on the 31st day of May, 1900, and on the 14th day of July, 1900, the premises were sold under execution to the respondent in this action. The sale was duly confirmed, and on the 9th day of September, 1901, a sheriff's deed was issued to the purchaser, which was recorded on the 26th day of May, 1902. On May 6, 1902, Henry Herrman executed a quitclaim deed of the premises to G. A. Miller. October 13, 1902, Elizabeth Jane Herrman and husband executed a quitclaim deed of the premises to Leonard E. Miller. On March 14, 1905, Leonard E. Miller and G. A. Miller executed a quitclaim deed of the premises to the appellants.

In view of the conclusion we have reached as to the effect of the judgment of foreclosure in the action to foreclose the street grade assessment, and the sheriff's deed issued thereunder, we do not deem it necessary to consider other questions discussed in the briefs. From the foregoing statement, it will be observed that the appellants claim title from two sources;

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first, through a quitclaim deed from Henry Herrman; and second, through a quitclaim deed from Elizabeth Jane Herrman and H. P. Herrman, her husband. Any right or title Henry Herrman may have had in the premises was vested in him at the time the action to foreclose the street grade assessment was commenced, and at the time final judgment was rendered therein. Henry Herrman was a party to that action, and assuming that his title had not been divested prior to the commencement of the action, the foreclosure judgment and sheriff's deed cut off any interest he had in the premises. The quitclaim deed thereafter executed by him conveyed nothing. On the other hand, any title or interest the appellants may claim through the quitclaim deed from Elizabeth Jane Herrman and husband was vested in Elizabeth Jane Herrman and husband at the time of the commencement of the action to foreclose the street grade assessment, under the unrecorded assignment of the certificate of purchase from the Emerson Investment Company. The Emerson Investment Company was a party to that action, and the filing of the notice of *lis pendens* and the subsequent judgment and sheriff's deed cut off any interest the Herrmans may have acquired through their unrecorded assignment. The appellants contend that the respondent and those under whom he claims had notice, actual or constructive, of the unrecorded assignment, but this fact is immaterial. The effect of filing a notice of *lis pendens* in a foreclosure suit was fully considered by this court in *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429. In that case the court said:

"This court has frequently held that the holder of the legal title to real property is a necessary party to an action to foreclose a mortgage or other lien against it. *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268, and cases cited. Since the holder of the legal title is an essential party to such an action, it is equally essential that the holder of the mortgage or other lien should have certain and definite means of ascertaining who is the holder of the legal title, within this rule. In our

opinion our statute furnishes such means. Bal. Code, § 4887, provides for the filing of a notice of *lis pendens* in actions affecting the title to real property, and that, from the time of filing such notice, the pendency of the action is constructive notice to purchasers and incumbrancers of the property affected by the action, 'and every person whose conveyance or incumbrance is subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were a party to the action.'

And after discussing other questions not material here, the opinion concludes as follows:

"As stated above, the correct rule is that the claimant under an unrecorded instrument is bound by the judgment of foreclosure, to the same extent, and in the same manner, as if he were a party to the action, where the *lis pendens* is filed. If the claim under the unrecorded instrument is superior and paramount to the claim of the plaintiff in the foreclosure, and the plaintiff had notice of such unrecorded instrument, the claimant under the unrecorded instrument would not be bound as a party to the action, and therefore will not be bound if not made a party, even though the *lis pendens* be filed. But, if the claim under the unrecorded instrument is junior and inferior to the claim under the mortgage, the holder thereof is bound absolutely, because he would be so bound if made a party defendant."

The lien of the street grade assessment was paramount and superior to the claim of any of the parties hereto, and the judgment of foreclosure is therefore binding upon the appellants, and those under whom they claim, by reason of the notice of *lis pendens*.

It is argued that the wife of George Vautier was not made a party to the foreclosure proceedings, but the appellants' entire case rests upon the theory that Vautier and wife had no interest in the property. If this is true, she was neither a necessary nor proper party to that action. If, on the other hand, the Vautiers had title, the appellants have none, and cannot complain of the omission to make Mrs. Vautier a

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party. Furthermore, the Vautiers have conveyed the premises by warranty deed to the respondent. Some claim is made that the relation of landlord and tenant existed between the parties to this action, by construction or operation of law. The record affords no basis for this claim, but if it did, the parties were claiming adversely to each other, and either might lawfully strengthen his claim by obtaining a tax or street assessment deed. *Stoll v. Griffith*, 41 Wash. 37, 82 Pac. 1025.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, DUNBAR, and CROW, JJ., concur.

[No. 6391. Decided December 8, 1906.]

AMANDA HAMMOCK, *Respondent*, v. THE CITY OF TACOMA,
Appellant.¹

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—KNOWLEDGE OF DEFECT—EVIDENCE—SUFFICIENCY. Proof that a sidewalk had been constructed for a number of years, and that it had been out of repair and unsafe in places on each side of and near to the place of the accident for more than a year, is sufficient to show constructive notice on the part of the city of the particular defect, although the same was not so apparent that it could be observed by the exercise of ordinary care by one using the walk; since the city's duty to inspect and take notice of its condition, is greater than that of a traveler observing only the surface of the walk.

TRIAL—INSTRUCTIONS. It is not error to refuse requested instructions that are covered in the general charge.

MUNICIPAL CORPORATIONS—NEGLIGENCE—DEFECTIVE SIDEWALKS—DEFENSES—EXTENT OF WALKS. In an action for personal injuries sustained through a defective sidewalk, it is not error to exclude evidence of the extent of the walks under the control of the city, to show the diligence of the city, where the contest is over the question as to whether there was any defect at all in the walk, and the walk had been out of repair for more than a year.

¹Reported in 87 Pac. 924.

APPEAL—DECISION—LAW OF CASE. A decision upon a former appeal that a notice of claim against a city for personal injuries is sufficiently definite, becomes the law of the case, and cannot be reviewed.

TRIAL—MISCONDUCT OF COUNSEL. Where the evidence shows plaintiff's counsel was not present at a certain time and place, it is not prejudicial error for the counsel in argument to the jury to state that fact as a conclusion without stating that the "evidence shows" such fact.

SAME. In an action against a city for personal injuries it is not necessarily prejudicial error, requiring a reversal, for plaintiff's counsel, in replying to comments on the absence of certain witnesses, to state in argument to the jury that they were working for the city and requested not to be called as witnesses, where it does not appear to have in any way affected the result.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 10, 1906, upon the verdict of a jury, rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

C. M. Riddell, R. E. Evans and J. W. Quick, for appellant.
Gornor Teats, for respondent.

FULLERTON, J.—The respondent brought this action to recover for personal injuries. In her complaint she alleged that on June 12, 1904, while she was walking along one of the sidewalks in the appellant city in the company of her daughter, the daughter stepped upon a broken board in the walk, or a board which broke under her weight, causing one end of it to raise up; and that she tripped over the raised end of the board and fell to the walk, which fall caused the injuries of which she complains. The city took issue upon the allegations of the complaint, and a trial was had, which resulted in a verdict and judgment in favor of the plaintiff. The city appeals.

The first contention on the part of the appellant is that the evidence was insufficient to justify the verdict; the precise objection being that there was no evidence tending to show

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that the city had knowledge prior to the accident, either actual or constructive, of the particular defect that caused the injury. The evidence relied upon by the respondent to show notice on the part of the city was the testimony of certain witnesses who resided in the vicinity of the place of the accident. These witnesses testified that the walk in front of the block where the accident occurred was constructed a number of years prior to the time of the accident, and had been out of repair for more than a year prior thereto; that the stringers supporting the walk were decayed, and in some places entirely gone; that the ends of the boards forming the walk were in many places rotted off, leaving them loose so that they would give way at one end and tilt at the other; and, generally, that the walk was unsafe to travel upon. None of them, however, were able to testify that they had noticed the condition of the walk at the precise place of the injury, and the respondent testified, and the jury found, that the defect at the place was not so apparent as to be observed by the exercise of ordinary care and caution.

It is on this testimony and finding that the appellant bases its contention. It argues that notice of defects in the immediate vicinity of a particular place is not notice of defects at that place; and that if the defect causing the injury was not observable to the respondent by the exercise of ordinary care and caution, it could not be observable to the city officers by the exercise of the same care, and hence the city could not be chargeable with constructive notice under the testimony. But the fallacy of this reasoning lies in the assumption that the degree of care is the same in each instance. A person having a lawful right to travel upon a sidewalk has the right to assume that the walk is in ordinary good repair, and that there is no latent defect which may cause an injury. He is guilty of contributory negligence, therefore, only where he is injured by some patent defect which he could have observed and avoided by the exercise of ordinary care, or by some de-

fect he knows exists in the walk, whether latent or patent, which he did not take ordinary care to avoid. But with the city it is different. It is charged with the duty of keeping its walks in ordinary repair. It must take notice that time and use will destroy sidewalks, no matter how carefully constructed or how safe and secure they may have been when originally constructed. It must not only examine the surface, but the supports, of the walks whenever it has reasonable cause to believe that these supports are getting out of repair. In a word it must exercise that degree of care that common sense declares to be necessary in order to keep its walks reasonably safe for ordinary use.

Tested by these rules, it is apparent that the respondent did not have to prove, in order to charge the city with notice, that the particular plank that caused her injury was so obviously defective that it could have been discovered by the mere observation that a traveler along the walk is required to exercise to avoid injury. On the contrary, proof that the walk had been constructed for a number of years, and that it had been for more than a year out of repair and unsafe in places on each side of and near to the place of the accident, was proof sufficient to charge the city with notice of the condition of the walk at the place of the accident; and being charged with such notice, its failure to repair it, or warn against its use, was such negligence as would render it liable to any one injured by reason of its defective condition who was not himself guilty of negligence which contributed to the injury.

It is next assigned that certain instructions given by the court stated the law too broadly, inasmuch as they authorized the jury to find for the respondent even though they might not find certain other conditions necessary to render the city liable. The particular paragraphs of the charge pointed out might be subject to the criticism made on them were they not qualified by the further instructions of the court. But we find they were so qualified. In an instruction given al-

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most immediately following the instruction complained of, the court stated the limitation on the city's liability in almost the very language counsel insists it should have been stated. This was enough. It is not necessary that each paragraph of the court's charge contain the limitations and modifications of the general rules announced. To do so usually leads to prolixity which tends rather to confuse the jury than to enlighten them.

It is next complained that the court erred in refusing to permit the assistant city engineer to testify to the extent of the sidewalks within the city of Tacoma under its control. But we think there was no error in this ruling. In cases where the defect causing the injury is of recent origin, and it is sought to charge the municipality liable for the defect with constructive notice, it has sometimes been held that it was proper to show the length of the walks under the control and supervision of the municipality for the purpose of showing whether the municipality ought, in the exercise of reasonable diligence, to have discovered and remedied the defect in the limited time elapsing between the origin of the defect and the injury, but such a showing could not have enlightened the jury in this case. The contest here was over the question whether in fact any defect existed at all. If the respondent's witnesses were to be believed, it stood as a matter of law that the city officers were negligent; while on the other hand, if the city's witnesses were to be believed, there was no liability in any event. In such a case, evidence that the length of the sidewalks was great or little could not affect the case one way or the other.

It is next insisted that the notice of the injury given the city was not sufficiently definite in its description of the place of the accident. But this is the very question, and the only question, decided by this court when the case was before it on the former appeal. *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893. The decision at that time holding the notice

sufficient became the "law of the case," and the court cannot now properly review it, whether right or wrong. *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; *Furth v. Snell*, 13 Wash. 660, 43 Pac. 935.

On the trial the appellant introduced two witnesses for the purpose of showing that the daughter of the plaintiff, in pointing out the place of injury to her attorney, located the place in front of a block some distance from the place it was claimed in the notice and complaint that the accident occurred. In rebuttal of this, the daughter was recalled, and testified that she was not at the place mentioned with the respondent's attorney at the time the appellant's witnesses testified they saw them there; testifying further in that connection that she was there with the attorney for the first time just preceding the former trial, which occurred in March, 1905, while the appellant's witnesses testified that they saw her there in the month of June or July in the year before. On the argument, commenting on this evidence, the attorney said: "As to myself being out there, I wish to state simply that the witnesses are mistaken; their identification is off: I never was on that ground until February, 1905." This statement was objected to on the ground that it was making use of facts within the personal knowledge of the attorney not justified by the evidence. But plainly the attorney stated nothing the evidence did not justify. He might have made the statement less personal by using the phrase, "The evidence shows," or one of a similar nature, but because he stated the conclusion in direct language is not cause for reversing the judgment.

In the course of the trial, it was shown that a Mr. Bradshaw, the husband of the respondent's daughter, and a Mr. Williams, a son of the respondent, were witnesses to certain transactions connected with the respondent's injury. They were not called as witnesses, and this fact was commented on

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by the city's attorneys in their argument to the jury. In reply thereto the respondent's attorney used this language:

"I knew when counsel came to argue this cause they would say where is Bradshaw, the husband of Mrs. Bradshaw, and where is the son of Mrs. Hammock. I will tell you where. These people are poor, they look like it. Since they commenced this action they have got lucrative positions in the city of Tacoma and they asked me that if it was not necessary to corroborate the testimony of their mother and sister, not to call them because of their positions, and I did not do so. That is where they are."

It is said that this exceeded the line of legitimate argument, and requires a reversal of the case. We do not think, however, that such an extreme penalty should be visited on the respondent. Jurors are generally men of intelligence, and usually distinguish clearly between facts that are matters of evidence and facts stated by counsel in the course of the argument, and we do not think they were misled in this instance. The court however does not wish to be understood as sanctioning this line of argument. We recognize it as error, but refuse to reverse the case because we do not think in this instance it in any way affected the result of the trial.

The judgment appealed from is affirmed.

MOUNT, C. J., HADLEY, RUDKIN, and DUNBAR, JJ., concur.

ROOT and CROW, JJ., took no part.

[No. 6464. Decided December 8, 1906.]

O. P. BURROWS *et al.*, *Respondents*, v. GRAYS HARBOR BOOM
COMPANY and THE HUMPTULIPS DRIVING
COMPANY, *Appellants*.¹

NAVIGABLE WATERS—OBSTRUCTION—RIPARIAN RIGHTS—LOGS AND LOGGING—BOOM COMPANIES. The right of riparian owners to the unobstructed navigation and use of the waters of a meandered navigable stream is not in any way affected by the statutory provisions (Laws 1889-90, p. 470, § 1) authorizing the incorporation of boom companies and conferring power on such companies to acquire and use real and personal property necessary for carrying on the business of booming logs, by the right of eminent domain.

SAME—STATUTES—CONSTRUCTION. The act of 1895, p. 128, § 4, wherein it is provided that nothing therein shall be construed to authorize a boom company to injure or damage any property, shows the legislative intent that such companies, whether incorporated before or after the act, should have no exclusive right of navigation or authority to obstruct the stream; since the same was, in part, an act to enlarge the power of boom companies theretofore incorporated.

SAME—EMINENT DOMAIN. The legislature has no power to confer authority upon a boom company to overflow the land of riparian proprietors or to make any use of or injure the land above the line of ordinary high water, or encroach upon the banks of a navigable river, as the same would be a taking or damaging of property without first making compensation therefor, in violation of Const., art. 1, § 16.

SAME. There is no distinction as to the rights of riparian owners to injunction between meandered and nonmeandered streams, as far as the right of boom companies to float logs is concerned.

SAME—RIGHT OF BOOM COMPANY TO OBSTRUCT STREAM—NEGLIGENCE. The reasonable care of a boom company in its operations of floating and booming logs does not justify an obstruction of navigation and injury to the lands of a riparian owner, where there is actual invasion of constitutional rights and a permanent taking, use and damaging, by the overflowing of, and lodging of logs, on the land, and the use of the bank as one side of the company's boom, and permanent obstruction of the waterway.

¹Reported in 87 Pac. 937.

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Citations of Counsel.

NAVIGABLE WATERS — RIPARIAN RIGHTS — STATUTES — DAMNUM ABSQUE INJURIA. The statute authorizing the incorporation of boom companies expressly guarantees the rights of riparian owners when it provides that a boom company shall not interfere with navigation or injure or damage adjacent lands; and in such case there can be no application of the doctrine of *damnum absque injuria*.

INJUNCTIONS—DECREE AGAINST OBSTRUCTION OF STREAM AND DAMAGE TO RIPARIAN RIGHTS—CONSTRUCTION. A permanent injunction against the obstruction of navigation in front of the plaintiffs' premises, is to be construed with reference to the plaintiffs' rights only; and a decree is not objectionable as too broad or practically preventing the doing of business by a boom company, where it enjoins the defendant from obstructing navigation in front of the plaintiffs' lands, from sorting or holding logs against or using the banks of said premises, from operating any boom so as to prevent plaintiffs' use or navigation of the river, or to cause the overflowing of the lands, from causing artificial floods overflowing the lands, and from using plaintiffs' premises as one side of its boom, and requiring it to keep open a waterway 50 feet wide next to said lands.

SAME—LOGS AND LOGGING. The statute providing that boom companies shall not interfere with navigation does not require a free passage on both sides of the boom for all boats, inasmuch as the company is given power to condemn lands and rights necessary to operate its business.

Appeal from a judgment of the superior court for Chehalis county, Chapman, J., entered May 19, 1906, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, enjoining the obstruction of a navigable stream and the interference of plaintiffs' rights as riparian owners thereon. Affirmed.

J. B. Bridges and Ben Sheeks, for appellants, contended, *inter alia*, that riparian owners have no special or peculiar rights below the line of ordinary high tide by reason of their ownership of the uplands; not even a right of access. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Board of Harbor Line Com'rs v. State*, 2 Wash. 530, 27 Pac. 550; *Tomlin v. Dubuque etc. R. Co.*, 32 Iowa 106, 7 Am. Rep. 176; *Lansing v. Smith*, 4 Wend. 9; *Gould v. Hud-*

son River R. Co., 6 N. Y. 522; *Sultan Water & Power Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *Hutton v. Webb*, 59 L. R. A. 33, and note; 4 Am. & Eng. Ency. Law (2d ed.), 709. Private rights when recognized must yield to the superior public right of navigation—the floating and booming of logs. *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 2 N. W. 546; *Keator Lumber Co. v. St. Croix Boom Co.*, 72 Wis. 62, 38 N. W. 529, 7 Am. St. 837; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126. A state has the absolute right to control navigation upon a navigable stream until such time as the United States government shall exercise its control over the stream. It has the right to permit the stream to be either partially or entirely obstructed against ordinary boat navigation. *Hutton v. Webb*, *supra*; 4 Am. & Eng. Ency. Law (2d ed.), 709; 21 Id. 432; *Green & Barren River Nav. Co. v. Chesapeake etc. R. Co.*, 88 Ky. 1, 10 S. W. 6, 2 L. R. A. 540; *Stevens v. Paterson etc. R. Co.*, 3 Am. Rep. 269; *Georgetown v. Alexandria Canal Co.*, 37 U. S. 91, 9 L. Ed. 1012; *Gilman v. Philadelphia*, 70 U. S. 713, 18 L. Ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Bailey v. Railway Co.*, 44 A. D. 593; *Tomlin v. Dubuque etc. R. Co.*, *supra*; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126; *Black River Imp. Co. v. La Crosse Boom etc. Co.*, 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66; *Wisconsin River Imp. Co. v. Manson*, 43 Wis. 255; *Keator Lum. Co. v. St. Croix Boom Co.*, 72 Wis. 62, 38 N. W. 529; *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149. If individuals are, in consequence thereof, incidentally injured, such loss is *damnum absque injuria*. *Bailey v. Railway Co.*, and *Stevens v. Patterson*, *supra*. The stream is a navigable stream within the laws and constitution of the United States. *United States v. Wishkah Boom Co.*, 136 Fed. 42; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437. The whole

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question of the blocking of the stream above the boom must be resolved down to a matter of negligence or want of negligence upon the part of the boom company. Bal. Code, § 4380; *Watts v. Tittabawassee Boom Co.*, 52 Mich. 203, 17 N. W. 809; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Swanson v. Mississippi etc. Boom Co.*, 42 Minn. 5, 44 N. W. 986; *Page v. Mille Lacs Lum. Co.*, 53 Min. 492, 55 N. W. 608, 1119; *Hunter v. Grande Ronde Lumber Co.*, 39 Ore. 448, 65 Pac. 598; *Coyne v. Mississippi etc. Boom Co.*, 72 Minn. 533, 75 N. W. 748, 41 L. R. A. 494; *Small v. Harrington*, 10 Idaho 499, 79 Pac. 461; *Field v. Apple River Log-Driving Co.*, 67 Wis. 569, 31 N. W. 17; *Hopkins v. Butte etc. Commercial Co.*, 13 Mont. 223, 33 Pac. 817, 40 Am. St. 438; *Bauman v. Pere Marquette Boom Co.*, 66 Mich. 544, 33 N. W. 538; *Mitchell v. Lea Lumber Co.*, 43 Wash. 195, 86 Pac. 405. Damages caused by the logs or by artificial freshets were the necessary result of the operation of the boom, and for which there can be no recovery unless there was negligence. *Mitchell v. Lea Lumber Co.*, *supra*; *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 58 N. W. 257; *Black River Imp. Co. v. La Crosse Boom etc. Co.*, *supra*; *Sands v. Manistee River Imp. Co.* *supra*; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *A. C. Conn Co. v. Little Suamico Lum. etc. Co.*, 74 Wis. 652, 43 N. W. 660; *Field v. Apple River Log-Driving Co.*, *supra*.

J. W. Robinson (Bogle, Hardin & Spooner, of counsel), for respondents.

DUNBAR, J.—This was a suit to enjoin the appellants from interfering with alleged rights of respondents as riparian owners and otherwise. The complaint is so long that space and time will permit presenting but a short summary of it. It alleged, that the plaintiffs were the owners of certain lands bordering upon the Humptulips river, in Chehalis county, Washington; that the river was about two hundred and fifty

feet in width, navigable for the floatage of sawlogs and other timber products and for small boats; that the waters of the river opposite plaintiffs' premises were suitable for domestic purposes; that plaintiffs had built a home on the west bank of the river, and were residing there; that the river furnished them the most convenient public highway; that the defendants were corporations, under the laws of the state of Washington, and had constructed boom works in the river immediately below the premises of the plaintiffs; that by reason of such construction, the river, at and opposite plaintiffs' premises, was, for a great portion of the time, completely filled with sawlogs, thus depriving plaintiffs of their right to navigate said river, and to cross the same and to go down the same to the waters of Grays Harbor; that defendants used the west bank of the river where plaintiffs' lands were located as the west wall of their boom, and the large number of logs accumulating in the river at and near plaintiffs' premises caused the water of the river to dam up and overflow plaintiffs' lands and endanger their home, and to prevent the use of the water for domestic purposes; that the maintenance and operation of the boom caused the banks of plaintiffs' land to be washed away; that such injury was continuous, and that the defendants used the said river, both opposite and below the plaintiffs' premises, for the storage of logs. Other allegations in relation to future damage which would be incurred in the operation of the boom and driving companies appear in the complaint. The facts found by the court, and which from an investigation of the testimony we will accept as the facts in the case, will more concisely divulge the allegations of the complaint, as they are based upon such allegations.

The answer denies practically all the complaint, or that portion of it which alleged that damage was being done to the plaintiffs by reason of the operation of the booms; and further alleged that the defendants were corporations, duly organized and existing by virtue of the laws of the state of

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Washington in relation to boom companies; and that whatever they had done, they had the permission of the state of Washington and the United States government to do. And it may be said here that this is the pivotal question in the case—whether they had the permission of the state of Washington and of the United States government to do the things which it was found by the court they had done.

The court found, in substance, that the Grays Harbor Boom Company and the Humptulips Driving Company, defendants, were both corporations, organized and existing under the laws of the state of Washington, each having its principal office and place of business at Aberdeen, Washington, and that C. D. Burrows and A. P. Stockwell were at all the dates mentioned in the complaint, and were at the time of the trial, the only stockholders and officers of each of said corporations [Under this finding, the correctness of which is not disputed, we will not find it necessary to enter into a discussion of the different responsibilities of these two alleged different corporations]; found that the plaintiffs were the owners of certain land adjoining the Humptulips river at the place alleged in the complaint; that the Humptulips river was a government meandered fresh-water stream, emptying into the waters of Grays Harbor; that it was navigable in its natural condition for small craft, and was floatable for many miles inland, and through the plaintiffs' lands; that the average width of the river from the mouth to the north line of plaintiffs' lands was about two hundred and fifty feet; that the water therein for that distance was of a depth of from ten to fifteen feet, mean high water, and from four to five feet, low water; that the water was suitable for domestic and livestock purposes in front of plaintiffs' premises, and was used by them for domestic and livestock purposes, from the date of their residence upon said premises until the acts of the defendants prevented them from so using them; that the water in said river in front of plaintiffs' premises was suit-

able for domestic and livestock purposes during the whole of the year, excepting during the months of July and August, when it was slightly brakish; that the plaintiffs purchased these lands in the year — and thereafter erected on the west bank of said river on said premises a dwelling, consisting of ten rooms, being a two-story frame building, and a barn, with the usual outhouses for wood, hogs, cattle, chickens, etc., and had cleared and put in cultivation about — acres of land in the vicinity of the house adjoining said river, and removed to such premises with their family, consisting of plaintiffs and their children, two boys and two girls, being from the age of two and one-half to eighteen years; that they put out fruit trees and constructed fences upon said premises, and have kept, and did keep at the time of the trial, livestock consisting of cows and other cattle, hogs, horses, and chickens, all of which stock pastured and fed upon said premises and depended upon said river for fresh water for drinking purposes; that said livestock had no other way of getting water except by going down the west bank of said stream to the waters of said river; and that these plaintiffs purchased and improved said premises for a permanent home, and particularly because said premises abutted upon said river and public waterway; that the said river in its natural condition, unobstructed, constitutes a natural public highway for these plaintiffs, and the only public highway leading to and from their residence; that ever since about the 1st day of September, 1905, the defendants had caused said public waterway to be filled with sawlogs from bank to bank in front of plaintiffs' premises, and above the boom located there, and that said sawlogs had wholly obstructed said waterway to navigation in front of plaintiffs' premises during the whole of this period, except for a few days at a time not exceeding altogether the period of three weeks from the 1st day of September, 1905, to the date of the trial hereof (which was about the middle of March, 1906); that by reason of such operations

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of the defendants, plaintiffs had been deprived of the use of the river for navigation and of their rights of ingress and egress, and many of said logs had rested or lain against the banks of plaintiffs' lands both below and above the line of mean high water, and that in places, certain sawlogs lie in part upon the banks above the line of mean high water, and that during much of this time these sawlogs have been so closely packed and jammed in said river from bank to bank, that these plaintiffs have been unable to use this river for any purpose whatsoever; that the public schoolhouse in that school district is located on the east side of the river, and the plaintiffs' children, notwithstanding that they have rowboats for that purpose, are unable to use the same on said river in front of plaintiffs' premises, to cross the river to attend school; but are compelled to cross the river on foot over said logs, and are in great danger on account of having to cross the river over defendants' logs; found that plaintiffs, by reason of the obstructions to said river, were at much greater expense to ship in their supplies, etc.; that the boom company had kept the river, from its boom to the west bank of said river, filled with sawlogs almost continuously since the first day of September, 1905; that it had used that portion of the west bank of said river belonging to plaintiffs, both above and below the line of mean high water, as the west wall of said boom; that the whole bed of the river was filled with logs from top to bottom in places above the surface of the water; and that the boom was so located and operated that it acted as a dam, by reason of which the water backed over plaintiffs' premises to a depth of several feet, and that such back water overflowed portions of plaintiffs' premises to plaintiffs' injury; that the logs are jammed and lodged in the river in front of plaintiffs' premises above and below the line of mean high water and against the banks thereof, grind and carry away quantities of plaintiffs' soil, thus doing plaintiffs' premises damage, which obstruction and damages are continuous

from day to day so long as said river is jammed with logs from bank to bank, and that the logs lying partly out upon the bank, when carried down, cut away quantities of the soil and thus destroy the lands of the plaintiffs', and that at certain times the defendants during recent months have hauled the sawlogs off the banks of plaintiffs' premises into the river with a donkey engine operated upon a float in said river, and plaintiffs' premises have been damaged thereby, and will continue to be damaged so long as so used; that the defendants maintain and operate a number of splash dams upon the Humptulips river, and the branches thereof above the lands of plaintiffs, and that by reason of such splash dams and the lifting of the gates thereof, the depth of the waters in the river is raised in the vicinity of plaintiffs' premises to the extent of two feet, and that by reason of these artificial freshets, sawlogs are carried down said river and cause jams in front of plaintiffs' premises, to their injury; that plaintiffs have thereby been deprived of the use of the water of said river for navigation and for domestic and livestock purposes; that such freshets and artificial freshets damage the land and endanger the lives of the family and of the livestock of the plaintiffs; that the damages are irreparable and cannot be estimated in dollars and cents, and that said conditions will increase from time to time as the logging industry above the lands of plaintiffs increases; and much more to the same effect.

From these findings of fact, it is concluded that the plaintiffs are entitled to a perpetual injunction against these defendants, and each of them, from obstructing the Humptulips river to navigation in front of the lands of these plaintiffs, and using the said river in front of plaintiffs' premises for the purpose of storing logs, either in the water of said river or upon or against the banks above or below mean high water, from using any artificial means above the lands and premises of these plaintiffs, to increase the flow or volume of

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water in front of plaintiffs' property, and other conclusions of law of similar import.

From these findings and conclusions, the court made the following decree:

"(a) That the Grays Harbor Boom Company and the Humptulips Driving Company, and the officers, agents, representatives and employees of each of said corporations, be, and they are hereby perpetually enjoined and restrained from obstructing the Humptulips river to navigation, from the mouth of said river, where it empties into Grays Harbor up to the north line of the lands and premises belonging to these plaintiffs and described in the complaint herein, and particularly from obstructing said river to navigation in front of the lands and premises of these plaintiffs, described as follows, to wit: Lot 1 in section 15, lots 3 and 4, in section 10, lots 1 and 3, the southwest quarter of the northeast quarter and the east one-half of the southeast quarter of section 9, all in township 18, north range 11 west of the Willamette Meridian, situate in Chehalis county, Washington, Where said lands abut upon said Humptulips river, of which lands and premises these plaintiffs were and are the owners in fee simple in possession of and entitled to the possession thereof, down to the line of mean high water on the banks of said river.

"(b) And from sorting, holding or rafting logs in the waters of said river in front of said lands of these plaintiffs, or upon or against the banks of said premises above or below the line of mean high water and from in any manner using the west bank of said river in front of plaintiffs' premises above the line of mean high water.

"(c) From operating any boom within said Humptulips river in such manner as by the method of operation solely to cause sawlogs to jam or fill the river so as to prevent the navigation or use of the river by these plaintiffs, for navigation in the usual manner, or from maintaining a boom in said river or obstructing said river so as to raise the water, causing plaintiffs' lands to overflow.

"(d) From operating or using any artificial means such as splash dams within said river or its tributaries above the lands and premises of these plaintiffs, to increase the volume

or flow of water past plaintiffs' premises in such manner as to injure or damage plaintiffs' property.

"(e) From in any manner occupying, using or damaging the premises of these plaintiffs, abutting upon the Hump-tulips river above the line of mean high water.

"(f) From exercising any of the powers or authority given to the defendants or either of them, by the statute of the state of Washington, or by reason of their plat or charter, in a manner that will directly cause any of plaintiffs' lands to be overflowed or damaged.

"(h) That as to that portion of the plaintiffs' premises located within the defendant, the Grays Harbor Boom Company's boom, these defendants and each of them and each of their officers, agents, representatives and employees, are hereby perpetually enjoined from using the banks of these plaintiffs' lands above the line of mean high water for one side or retention wall of the boom, and the said boom company is hereby ordered and required to keep open a waterway next to the said west bank of plaintiffs' water front within said boom, which waterway shall be kept open to navigation and shall be of the width of at least fifty feet.

"(i) And it is further ordered and adjudged that these plaintiffs do have and recover of and from the defendants herein, their costs to be taxed at \$19, and that execution issue therefor."

The first question discussed is, have the respondents as riparian owners the right, as an incident of their land, of unobstructed access to the navigable waters of the stream? In fact, the greater portion of the argument of respective counsel is devoted to this question. It is stoutly maintained by the appellants that this question has been answered in the negative by this court, in *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, and in subsequent cases sustaining that decision; while the respondents contend that the questions at issue here are not involved in that case. An examination of the whole record in this case convinces us that it is not necessary to determine the scope of the *Hatfield* decision; for conceding, for the purposes of this case, that it was decided in that case—and properly decided—that a ri-

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parian proprietor on the shores of the sea has no rights as against the grantee of the state to the occupancy of the shore lands in front of his upland, we do not think that this is a controlling question in this case. As we construe the statute under which the appellants claim their rights, no grant is made to boom companies of this state which in any manner interferes with the rights of riparian owners, or of any one else, or interferes with the right of navigation to any exclusive extent. Such companies are simply empowered to do business under certain restrictions, and are entitled to a joint use of the waters of navigable rivers. The main object of the act which provides for these companies seems to be to empower them to collect fees for the booming and storage of logs; and recognizing the public importance of the enterprise, the legislature conferred the right of eminent domain upon such companies. The act creating these companies and defining their powers, privileges and duties, is not long and does not seem to us to be difficult of construction. Laws 1889-90, page 470. The first section provides that,

"Any corporation heretofore or hereafter organized in the state of Washington for the purpose of catching, booming, sorting, rafting and holding logs, lumber or other timber products, shall have the power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation."

So far the statute seems to presuppose that the corporation will obtain all ground necessary for the operation of its business as other corporations do. It then proceeds:

"If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways."

The remainder of the section simply provides for a reversion in case the land is not used for the purposes specified. Section 2 provides for filing plat of surveys, etc. Section 3 deals with the character of the construction; and the remainder of the act, with the exception of § 9, consists of regulations between the companies and their patrons. Section 9 describes what waters are navigable, and decrees the use to be public. So, if there is any grant by the state to these companies which would bring them within the rule announced in *Eisenbach v. Hatfield*, *supra*, and a multitude of similar cases, it must be found in § 1, for that is the only section which assumes to grant any public rights; and we look in vain to this section for any license by the state to boom companies to interfere in any way with the navigation of the streams, or with the use of abutting land owned by others. On the other hand, this statute, in addition to a legislative recognition of shore rights in the upland owner, as opposed at least to the rights of the boom companies, by the plainest implication imposes upon the boom company the necessity of first obtaining the property necessary for carrying on its business, either by purchase, lease or condemnation. It was evidently the object of the law to prevent conflicting rights, instead of encouraging them by an arbitrary appropriation by the more powerful party to the controversy, and to this end the right of condemnation was bestowed.

Again, as indicating the intention of the legislature to prevent any infringement of the rights of others by these and kindred corporations, the legislature at the session of 1895 (Laws 1895, page 128), in an act relating to boom companies, entitled:

“An act to provide for the organization and incorporation of companies for clearing out and improving rivers and streams in this state, and for the purpose of driving, sorting, holding and delivering logs and other timber products thereon, fixing maximum tolls therefor”—

an act which was evidently intended simply to enlarge the

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rights of booming companies—provided, in § 4, that nothing shall be construed that shall in any way interfere with the navigation of such river or stream or the use of its waters for any purpose; provided further, that

“Any such wing dams, sheer booms, dams with gates or otherwise shall not be so constructed or used as to in any manner injure or damage any lands adjacent to such stream by overflowing same or causing logs or other timber to accumulate on any land adjacent to such stream so dammed or used.”

That it was intended that the provisions of this act should apply to boom companies under prior acts, is manifest from the provisions of § 8, which is as follows:

“Duly organized boom companies at present operating upon any of the streams or rivers of this state may file amended articles of incorporation to embrace the provisions of this act, and, for the purpose of time limitations mentioned in this act, the time of filing such amended articles of incorporation shall be deemed to be the time of organization thereof, but failure to comply with the provisions of this act shall work forfeiture of the rights of such corporations only so far as the same are subjoined under the provisions of this paragraph.”

Practically all the rights which are granted to boom companies under the act of 1889-90 are carried forward into the act of 1895, thereby simply enlarging the rights of boom companies; and it is not to be presumed that, within the contemplation of the legislative mind, one boom company organized under the act of 1890 would be permitted to interfere with the rights of navigation, and to commit depredation upon abutting lands, which rights were not accorded to boom companies organized under the act of 1895, although they might be incorporated under a different name.

This provision of the statute was construed by this court— if, indeed, such provision was susceptible of construction— in *Carl v. West Aberdeen Land etc. Co.*, 13 Wash. 616, 43 Pac. 890, where it was held that boom companies organized

under the Laws of 1895 have no right to interfere with the navigation or use of the streams upon which they have constructed booms. This was an action to prevent the Grays Harbor and Neuskah Boom Company from interfering with the passage down the river of the plaintiff's logs. In the course of its opinion, the court said:

"The third objection is founded upon the claim of rights by the appellant boom company under the act above referred to, and a large number of authorities have been cited to show that it is competent for the legislature to provide that such boom companies may interfere with the navigation of navigable streams. But such authorities are not in point, for the reason that the legislature, in the act in question, has not attempted to confer upon the boom companies organized thereunder any such right. In § 4 of the act (Laws 1895, p. 130), after providing what such companies may do, it is provided: 'Nothing shall be constructed that shall in any way interfere with the navigation of such river or stream, or the use of its waters for any purpose.' From which it will be seen that the legislature not only did not intend to give to such companies the right to interfere with navigation, but took pains by express provision to provide that they should have no such right."

From an examination of the statute, we conclude that, with the exception of the right of eminent domain and the right to charge and collect fees, the boom company stands upon no different footing from an individual. That the legislature did not intend to give any exclusive right of navigation to boom companies, although they may be dealing in business of great magnitude, but that they were restricted to a joint user of the waters of the stream, and that it was the plain intention to protect from their encroachments all other rights of navigation and rights of use in the waters of the river, is evident from the enactments on the subject. This being so, the boom company will be controlled by the same rule that is made applicable in the ordinary case of log driving in meandered streams.

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Again, according to the testimony in this case, the appellants have taken possession of the private property of the respondents, and the statute could not confer such a right even if it were the legislative intent, for the declaration of the constitution of assertion of ownership only goes to the beds and shores of all navigable waters in this state up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; and no right is asserted whatever above the line of mean high tide, which is evidently intended to be the dividing line between the rights of the public and the rights of the private individual. Again, in the interest of appellants' business, the respondents' lands are overflowed by back water, and by the use of splash dams logs are run on to their private lands and remain there indefinitely, or until it is convenient for the appellants to remove them; which action on the part of the appellants is directly in the face of the statute above quoted. To say nothing of taking or appropriating, this is certainly a damaging of property, and § 16 of article 1 of the state constitution provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner." This provision in the fundamental law was construed by this court, in *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, and in many subsequent cases, to mean just what it said; and it can make no possible difference whether the property abuts on a street or river, or whether the invader of that right is a municipality, an individual, or a boom company; the constitutional guaranty applies equally in both cases. It has been the uniform holding of this court that the owners of the banks of rivers should be protected from ravages made by driving logs down such rivers. This policy was announced and earlier

cases reviewed in *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, where, in the discussion of the case, it is said:

"Another provision of the decree, with reference to the methods attending respondent's navigation, also calls for examination. It will be remembered that, by its terms, the decree prohibits appellant from interfering with respondent's employees in the way of preventing them from going upon the banks of the stream upon appellant's lands, for the purpose of breaking jams of shingle bolts, so long as the going upon the banks does no injury to appellant or his lands. We think this provision of the decree is also erroneous. We believe we went as far as we should go in the interest of public convenience, when we held, in *Watkins v. Dorris*, *supra*, that private land owners hold the beds of unmeandered streams subject to the easement of driving timber products over the land. But we tried to make it clear in that case that the timber driver must confine himself and his operations to the highway itself—the bed of the stream—until the land owner consents to the use of the banks, or until the right to their use has been acquired in a lawful way. If a more emphatic statement of that rule is necessary, we now wish to be understood as making it, with all needed emphasis. The fundamental principle of right in the land owner to control his own premises, outside of the bed of the stream, must not be violated. To leave parties under such terms as this decree provides would, in many instances, invite trouble and litigation. Each one would assume to be his own judge as to whether any injury is done to the land. What might appear to the land owner as injury might not so appear to the timber driver, and thus a controversy would at once arise, probably requiring repeated litigation to settle. The driver must know from the beginning that he must, in no event, go upon the banks of the stream in his operations without the owner's permission, and thus controversies about damages accruing in that way will be avoided. Enough controversies will arise about the manner of operating in the bed of the stream to the possible damage of the adjacent land, without adding thereto those arising from semi-legalized trespass upon private premises, which would be the case if it were judicially held that one may operate upon private lands against the owner's consent, and without compensation."

It would seem that this language might properly be applied to the facts in this case, and that under such announcements there can be no question that the appellants should be enjoined from in any manner operating their business upon the lands of the respondents; and there can be no justification for the application of a different rule where the stream happens to be meandered, as applied to damage done to the land in the nonmeandered streams, the driver of the logs being given the benefit of the same use of the water that he would have in a meandered stream.

It is claimed by the appellants, in conclusion, that this injunction cannot be sustained by reason of the rule announced by the court in *Mitchell v. Lea Lumber Co.*, 43 Wash. 195, 86 Pac. 405, to the effect that no damages can be recovered for injuries which are merely the natural result of the use of a stream as a highway, where the operations have been conducted in a reasonably careful manner; and that, inasmuch as this decree is not based on negligence, it should not be allowed to stand. This announcement was not necessary to the decision of the case in *Mitchell v. Lea Lumber Co.*, *supra*, inasmuch as it was determined that there *was* proof of negligence on the part of the drivers. But, whatever may be said of the soundness of the doctrine announced in that case, the question is not involved here, where there has not only been an invasion of the constitutional rights of the respondents, but an actual, permanent taking and permanent use made of respondents' land, not only by using the west bank of their land as the west wall of the boom, but by using the land itself as a storage ground for logs that escape from the boom—an actual taking and damaging which, as we have seen, could not be indulged in without previous compensation. In addition to this, when it conclusively appears that the business in which the company is engaged cannot be carried on without damaging private interests, it would seem that the rule announced in the *Lea Lumber Company* case could not

logically be applied. And, if it be true, as we said in *Monroe Mill Co. v. Menzel*, *supra*, that the landowner has a right to enjoin the drivers of logs from going on to his banks, even when it was conceded that no injury was done, for the reason assigned that the fundamental principle of right in the landowner to control his own premises outside of the bed of the stream must not be violated, no room is left for appellants' contention in this regard.

But, outside of that question, in this case without doubt, the respondents have a right to rely upon the protection guaranteed to them by the statute, the same statute which authorizes the organization of boom and driving companies; (1) that they shall not have the right in any way to interfere with the navigation of the stream or the use of its waters for any purpose; (2) that they shall not have the right to injure or damage any adjacent lands, etc. If they have no right to do this, it is plain that there is no room for the application of the rule of *damnum absque injuria*, for in this kind of a case that rule is based upon the idea that a person is carrying on his business in a legal manner or under the sanction of the law; while, as we have seen, the law in this case expressly inhibits such a use.

The argument of appellants, based upon the difference between the importance and magnitude of the logging industry and the farming and other interests on the river, an argument which is largely the basis of their whole contention, is one that ought not to appeal to an American court, where justice is dealt out with an even hand to individual and corporation, to rich and poor, to strong and weak. Every citizen of this state must, not only in theory but in practice, be accorded by the law the prompt and efficient protection of his rights, regardless of the magnitude of his interests. It is the protection of the rights which is the object of the solicitude of the law, and not the ascertainment of the mercantile value of such right.

It is contended that, in any event, the decree is too broad, and that its practical effect will be to prevent the boom company from doing business on the Humptulips river. We do not think the decree can be properly so construed. While it is true that paragraph (a) of the decree enjoins and restrains the appellants from obstructing the Humptulips river to navigation within a certain distance, and particularly from obstructing said river to navigation in front of the lands and premises of these respondents, the decree will be construed only with reference to the rights of the respondents as alleged and proven. Paragraph (b) is necessary for the protection asked for by the respondents, and the same may be said of paragraph (c). Paragraph (d) is no stronger than the statute under which the companies are organized. Paragraph (e) refers especially to the premises of the respondents, and falls within all prior cases decided by this court. To the same effect is paragraph (f). The first part of paragraph (h) is with reference to the actual use of the respondents' lands, and the following: "The said boom company is hereby ordered and required to keep open a waterway next to the west bank of the plaintiffs' lands between its boom and said bank, the whole length of plaintiffs' water front within said boom, which waterway shall be kept open to navigation and shall be of the width of at least fifty feet," is correct upon the theory outlined by the statute, that it is the duty of the boom company to obtain the lands and rights necessary to operate their business. This construction does away with the contention, which we think is not a sound one, that the statute requires a free passage on both sides of the boom for all boats, vessels, or steam craft of any kind whatsoever, or for ordinary purposes of navigation, which would seem to be impracticable on many if not all of the streams of the state.

Construing the decree, then, with reference to the case before the court, we are inclined to the view that it is unob-

block; that the Provident Life & Trust Company examined the property and was satisfied with the security, and agreed to make the loan, provided the title should be passed by its attorney. Subsequently, the attorney for the trust company rejected the security, for the reason that the trustees had no authority under the will to mortgage the property of the estate. Otis Sprague then asked the attorney for the trust company if there was not some way by which the title could be adjusted so as to satisfy the trust company, and was informed by the attorney that, inasmuch as the will gave the trustees full power and authority to sell the property, they could convey the property to one of the residuary devisees, and that such devisee could then borrow the money and secure the same by a mortgage upon the property, and then reconvey the property to the trustees. Otis Sprague then went to the agent of the trust company and asked him if a loan could be made to Charles Sprague, if the property were transferred to said Charles Sprague by the trustees. Said agent answered that all matters pertaining to the title were left to their attorney, and that if said attorney passed the title, the loan would be made. Said attorney thereupon advised the agent of the trust company that a mortgage by Charles Sprague, under the circumstances, would give a valid lien upon the property. The trustees thereupon executed a deed conveying a certain portion of the Sprague block to Charles Sprague, for an expressed consideration of \$120,000, and, thereupon, Charles Sprague executed his note and mortgage in favor of the trust company for \$55,000, due five years from date, with interest at the rate of seven per cent per annum. The deed and mortgage were executed in August, 1894. The said \$55,000 was thereupon paid directly to the trustees of the Sprague estate by order of Charles Sprague. About four weeks later, Charles Sprague transferred the property back to the trustees of the estate, for an express consideration of \$120,000. The money received from this

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loan was used for the benefit of the estate. Forty thousand dollars was used to satisfy a mortgage existing on the Sprague block, at the time of the death of John W. Sprague, and the other \$15,000 was applied to the payment of a legacy designated by the will. In September, 1895, Otis Sprague, as trustee, again applied to the trust company for another loan of \$30,000, upon another portion of the Sprague block. This loan was subsequently made in the same way as the one above stated.

The complaint alleges, that \$6,300 of this last-named loan was used to pay taxes and assessments against the Sprague block, but the plaintiff does not know how the balance was expended; that Charles Sprague paid nothing for either of said conveyances to him by the trustees of the estate, and never took possession of the property, nor exercised any acts of ownership over the same; that he took no part in the negotiations leading up to the loans, beyond signing his name to such papers as he was advised to sign; that each of such conveyances was a sham and fictitious sale, made with the knowledge of the trust company, in order to evade the terms of the will of John W. Sprague, deceased, and that the mortgages made by Otis Sprague were illegal and void; that the trust company never loaned any money to the trustees of the estate, but loaned the same to Charles Sprague. The complaint then alleges that, in April, 1897, the trust company brought two actions in the superior court of Pierce county to foreclose the said mortgages executed by Charles Sprague to the trust company. One action was brought for each mortgage. Charles Sprague, the trustees of the estate, and each of the heirs, legatees and devisees under the will were made parties in these foreclosure actions.

The complaints in these actions alleged, that default had been made in the payment of interest, etc., and that the notes were then due; that the defendants in said actions appeared and answered the complaints, setting up the fictitious char-

acter of the mortgages, whereupon the trust company filed demurrers to the answers. These demurrers were sustained, the court holding that the mortgages were invalid. Thereupon, a stipulation was entered into by the attorneys representing the Provident Life & Trust Company (the plaintiff in the foreclosure actions) and the defendants therein, to the effect that the trustees of the Sprague estate and the residuary legatees under the will, including the plaintiff in this action, should convey to the trust company the mortgaged premises by a quitclaim deed, in satisfaction of the money advanced upon said mortgages, and that the trust company should have possession of the property and the rents thereof, but that the said legatees, or any one of them, might, within three years from the date of the stipulation, repurchase the said property, upon the payment of \$107,215.65, with interest thereon at the rate of seven per cent per annum from the date of the stipulation, less the net rentals of the property. The consideration for this stipulation was the dismissal of the foreclosure suits, and the payment to the trustees and legatees of \$1,075, in addition to the amount then owing from the estate to the trust company. Thereupon, on December 1, 1897, the trustees of the Sprague estate and the residuary legatees, executed a quitclaim deed conveying the Sprague block to the said trust company, and delivered possession thereof to said company.

The complaint alleges, that the property at that time was of the actual value of \$280,000, and is now of the value of \$400,000 or \$500,000; that, owing to the depressed condition of the real estate market and lack of funds, the said trustees have been unable to pay or discharge the claim of the trust company for the money advanced to the trustees of the estate, or to demand a reconveyance of said property, until at this time, and that the defendants, through the trust company, now claim to own said property. The complaint also alleges that the defendants herein, Betz and wife, have purchased the said Sprague block, but that prior to such

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purchase, and prior to the payment of any part of the purchase price thereof, the said defendants had actual and constructive knowledge of all the facts herein stated; that the improvements upon the property are now the same as in December, 1897, when the quitclaim deed was made; that large sums remain due upon legacies and debts of the estate, and there is no other property of the estate, and said estate has not been settled or closed. The prayer is for a decree adjudging the defendants to be trustees of the property for the benefit of the estate of John W. Sprague, deceased, for an accounting of rents and profits, and for an accounting of the amount due on account of the loan to Charles Sprague, as above stated, and for general relief.

Counsel for appellant have very learnedly and exhaustively discussed many questions in their briefs, among which questions are, that the transfers to Charles Sprague and the mortgages made by him to the Provident Life & Trust Company were void, because such mortgages were really the mortgages of the trustees who were given only the power to sell, and not the power to mortgage, and, therefore, the said mortgages were void; that the obligation to repay the money loaned by the Provident Life & Trust Company to Charles Sprague was the personal obligation of Charles Sprague, and not the obligation of the estate of John W. Sprague, deceased, and that, therefore, the quitclaim deed of December 1, 1897, was without consideration and void. In view of the conclusion which we have reached, it will not be necessary to discuss the other questions presented. We may assume, for the purposes of this case, that the trustees of the estate of John W. Sprague, deceased, had no power to borrow money or mortgage the estate; that the mortgages actually made were, in fact, the mortgages of the trustees and, therefore, void, and created no lien against the estate. But it does not follow that the quitclaim deed executed in 1897 by the trustees of the estate of John W. Sprague and the residuary

legatees to the Provident Life & Trust Company, was without consideration or void. It is not claimed, as we read the allegations of the complaint, that the money advanced upon the strength of the mortgages made by Charles Sprague, was not advanced in good faith by the trust company, and received by the trustees in good faith, and so used to satisfy claims for debts and legacies against the estate. On the other hand, it appears that the money was advanced in good faith, and was so received and used by the trustees for the benefit of the estate. The estate was therefore bound in good conscience to repay it. *Deery v. Hamilton*, 41 Iowa 16; *Iowa Loan & Trust Co. v. Holderbaum*, 86 Iowa 1, 52 N. W. 550; *Thomas v. Provident Life & Trust Co.*, 138 Fed. 348.

When the Provident Life & Trust Company brought actions to foreclose their mortgages, these mortgages were held void. But the trustees of the estate and the four residuary legatees, one of whom was this appellant in his personal capacity, realizing, at that time, that the estate was justly indebted to the trust company in the sum of \$107,-215.65, and that they had full power to sell the estate, "with or without notice, and upon such terms either for credit or cash as they should deem best," concluded that they should sell that part of the estate in question in satisfaction of this debt. The trustees exercised that power and sold, upon condition that the residuary legatees, or any one of them, might repurchase upon payment of the purchase price less the net profits at any time within three years thereafter, and as indicating the character of the sale, the stipulation, at page 358, provided:

"But this stipulation shall be construed only as an agreement on the part of the plaintiff [Provident Life & Trust Company] to sell said premises at any time within three years, and upon the expiration of said three years, this agreement to sell shall cease and determine, without any act or declaration on the part of the plaintiff, and thereafter the title to said premises, both legal and equitable, shall be abso-

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lutely in the plaintiff, and its right to sell and dispose of the same free of all claims on the part of the stipulating defendants, shall be unquestioned."

It cannot be doubted that the trustees of the Sprague estate were authorized to sell the estate at the time of this transaction for the sum of money owing by the estate to the Provident Life & Trust Company. If a sale had been made to a third party upon the terms and conditions entered into with the Provident Life & Trust Company, there can be no doubt that it would have been a valid sale. We see no reason why it could not have been made directly to the Provident Life & Trust Company in satisfaction of a debt owing by the estate to the trust company, which debt the trustees were obligated to pay. While the mortgages given to secure the debt were void, because beyond the power of the trustees to make, the sale of the estate was, we think, within the power of the trustees, and transferred the estate to the purchasers, who thereupon took possession and have continued to hold the same, not as security for a debt but as an absolute sale. *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199.

The case of *Thomas v. Provident Life & Trust Co.*, *supra*, was a case brought by a creditor of certain residuary legatees of the will of John W. Sprague, deceased, against such legatees, to subject the interest of such legatees to the payment of certain judgments recovered by such creditors. In that case a complete history of the estate of John W. Sprague, deceased, is set out. It was there said, at page 349:

"The trust company undoubtedly loaned its money in good faith. It could have had no object or purpose in doing otherwise. The borrowed money was used by the executors in discharging legal incumbrances on the estate, and in paying the debts of the estate. Afterwards, in consideration of their obligation to repay the money so advanced, the executors executed a quitclaim deed to the trust company. Who of the parties to this record was in a position to attack that

conveyance? It is unnecessary to say that the executors themselves were in no such position."

And yet, in this case, brought after the decision in that case, the plaintiff and sole surviving executor of the estate, seeks to set aside that conveyance. The plaintiff, in his personal capacity, joined in the execution of that conveyance. Under the facts alleged, the money was advanced to the trustees, and not to Charles Sprague or to his credit. The trustees were, in equity, bound to repay the money, and were authorized under the law to sell the property to repay the money. The sale was absolute at the end of three years, and was therefore more than a mortgage, because it transferred the whole title. We think that the complaint fails to state facts sufficient to constitute a cause of action.

The judgment of the lower court was right, and is affirmed.

ROOT, CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 6430. Decided December 10, 1906.]

CLAUDE O. ROWE, *Appellant*, v. WHATCOM COUNTY RAILWAY & LIGHT COMPANY *et al.*, *Respondents*.¹

APPEAL—REVIEW—EXCLUSION OF EVIDENCE—HARMLESS ERROR—DAMAGES. Error in excluding an answer to a question as to whether an injury might result in curvature of the spine, is harmless where the witness made a full and complete answer thereto in answer to another similar question.

DAMAGES—EVIDENCE—FEES OF EXPERTS. Where a physician is appointed by the court to make a physical examination in a personal injury case, at the instance of the defendant, evidence as to the fees paid therefor is properly excluded as irrelevant and immaterial.

EVIDENCE—FEES OF EXPERT. A question as to how much a medical expert is paid for testifying in "these cases" is properly excluded as assuming that the witness had testified for the party in other cases than the one on trial, where there was no evidence of such fact.

¹Reported in 87 Pac. 921.

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EVIDENCE—EXPERTS—CURVATURE OF SPINE. In an action for personal injuries resulting in alleged curvature of the spine, whether the test applied by other physicians to determine the fact of the curvature was a fair or proper test is a proper matter of opinion for a medical expert, which it is error to exclude as being a question for the jury to determine.

EVIDENCE—REBUTTAL. A physician who testified on plaintiff's case in chief that plaintiff had curvature of the spine, may be asked in rebuttal whether the test applied by other physicians was a fair test, when he was not questioned in chief as to any tests.

APPEAL—EXCEPTIONS—TO INSTRUCTIONS. An exception to "your Honor's instructions as to the measure of damages" is not sufficient to raise a question as to one instruction, where there were several on the subject.

DAMAGES—PROSPECTIVE EARNING CAPACITY—EVIDENCE—PROOF REQUIRED—INSTRUCTIONS. It is error to instruct that it is incumbent upon the plaintiff, in a personal injury case, in order to recover for prospective damages for impairment of earning capacity, that the same must be established by clear and convincing proof, since a preponderance of the evidence is all that is required.

DAMAGES — AGGRAVATION — REASONABLE CARE OF PLAINTIFF — INSTRUCTIONS. In an action for personal injuries an instruction is not erroneous as making the plaintiff responsible for the results of his physician's treatment, where it merely holds him to the exercise of reasonable care in securing treatment and seeking a cure.

TRIAL—INSTRUCTIONS. An instruction not pertinent to the issues in the case should not be given.

Appeal by plaintiff from a judgment of the superior court for Whatcom county, Neterer, J., entered January 13, 1906, upon the verdict of a jury, for damages in the sum of \$300, in an action for personal injuries sustained by a passenger in a street car collision. Reversed.

E. J. Grover and Jay C. Allen, for appellant.

Newman & Howard, for respondents.

RUDKIN, J.—This was an action to recover damages for personal injuries resulting from a collision between two street cars operated by the defendant Whatcom County Railway & Light Company. The defendants Walker and Ives were the motormen of the two colliding cars. The plaintiff was

awarded a judgment in the sum of \$300, and prosecutes an appeal therefrom to this court, assigning numerous errors in the exclusion of testimony and in the giving of instructions, in support of his appeal. The liability of the respondent company was admitted, so that the only issues in the case were as to the nature and extent of the appellant's injuries and the amount of damages he sustained. While the appellant claimed damages for a great many injuries in his complaint, the principal issue at the trial was whether he had curvature of the spine as a result of the other injuries received. Prior to the trial, the court appointed three physicians to make a physical examination of the appellant, at the request of the respondents. These physicians were called as witnesses by the respondents, and the first error assigned is in the ruling of the court sustaining an objection to the following question propounded to Dr. Birney, on cross-examination:

"Q. I will ask you doctor whether or not it would be possible from the injury to the chest and the injury that has been testified about in this case to the back, whether or not the shock that would necessarily result from such injuries would ever produce a curvature?"

The respondents contend first, that the objection was properly sustained because the question assumed facts not in evidence, and second, that if the error, if error, was harmless because the witness was afterwards permitted to answer the question. We think this latter contention must be sustained, as the following questions and answers will indicate:

"Q. I will ask you if from the injury to the plaintiff's hip and the pains in the back and the injury to the chest that has been testified about in this case, which might result in a weakening of the muscles, whether or not from those causes curvature could and probably would result, under proper circumstances? A. If it did, the evidence would be forthcoming in the plaintiff's case now. Q. Well, what evidence? A. He would be apt to have atrophy of his muscles,

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his muscles would be atrophied, or he would have some contraction or ankylosis. Q. Where? A. In the region where he was hurt. Q. Do you say that there are no such evidences in this case? A. I found none."

While the two questions are not identical in every respect, yet the answer given is a full and complete answer to both questions.

The second error assigned is in the ruling of the court sustaining objections to the following questions propounded to Dr. Kirkpatrick, one of the physicians appointed by the court, in the course of his cross-examination.

"Q. You have been paid by the defendant street railway company for making this examination? Q. How much does the street railway company pay you for testifying in these cases, doctor, over and above the regular lawful fees provided by law?"

While the witness was appointed by the court, he became a witness at the instance of the respondents, and they were obligated to pay, not only his fees as a witness, but reasonable compensation for making the physical examination of the appellant. The fact that the witness had been paid for his services at the time of the trial, was immaterial and irrelevant. The second question propounded does not present the question which the appellant seeks to raise in this court. The question assumed that the witness had testified for the respondent company in other cases, and inquired what he was paid for so doing. That question was irrelevant and immaterial in this trial, and whether it would have been competent to inquire what the witness was paid in the case on trial, we will not decide, as no such question is presented in the record before us.

The next error assigned is in the ruling of the court sustaining objections to the following questions propounded to Dr. Keyes, a witness called by the appellant in rebuttal:

"Q. I will ask you to state to the jury whether or not that is a proper test to be applied to this plaintiff in this

case, taking into consideration his physical condition and all the other questions that have been suggested concerning his confinement to the house, the fact that he has only been upon his feet a portion of the time? Q. I will ask you to tell the jury whether or not the test just made, of laying the plaintiff on his abdomen on the table, in the manner in which it has just been done by Dr. Birney and the other gentlemen assisting him, was a fair test in this case upon the question of curvature that is under consideration before this jury? Q. Dr. Keyes, I will ask you to tell the jury in this case whether or not the laying of the plaintiff upon the table upon his abdomen and face, pushing the left shoulder down, pulling the right shoulder up, for the purpose of changing the position of the spine, if possible, by getting the shoulders as nearly square as it was possible to have them placed in that position, whether that is a fair test upon the question of curvature as presented to the jury in this case."

The reason assigned by the court for its ruling was, that the question whether the tests applied by the witnesses for the respondents were fair or proper, was for the jury. In this the court erred. The witness was asked his opinion on a matter involving scientific and technical knowledge, not within the experience of the ordinary witness or juror, and should have been permitted to answer. Certainly the ordinary juror is not qualified to determine whether any given test will disclose the presence or absence of curvature of the spine without the aid of expert or opinion evidence. Nor is there any merit in the claim that the testimony was not proper in rebuttal. While the witness had already testified that the appellant had curvature of the spine, stating fully the reasons for his conclusion, yet he was asked nothing concerning the tests afterwards applied by the respondents' witnesses, and the appellant could not, and was not required to, anticipate the tests that might be resorted to. Here again the respondents contend that the error was without prejudice, because the witness afterwards answered the questions, but

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with this contention we cannot agree. The only question which the witness was permitted to answer was the following:

"Q. I will ask you what, if anything, the marking that has been made upon the back of the plaintiff along the line of the spinal column would show if the right shoulder was left in the natural position it has assumed."

This question does not cover the subject-matter of the interrogatories to which objections were sustained.

The next error assigned is in the giving of the following instruction:

"It is not enough for the plaintiff to show that he may possibly sustain any certain items of damage, but in order to recover he must prove to a reasonable certainty that he will in reasonable probability sustain damages. And in determining in this connection, you are instructed that the proof adduced by the plaintiff in regard to such impairment of his earning capacity must be clear and convincing, and you are not entitled to indulge in speculation or surmise in arriving at the amount of such impairment in his earning capacity, if you find such."

The only exception that could possibly refer to this instruction, is in the following language: "Plaintiff wishes to except to your Honor's instructions as to the measure of damages." Several instructions of the court referred directly, and indirectly, to the measure of damages, and the above exception is wholly insufficient to raise any question for review in this court. But in view of the fact that a new trial must be granted on other grounds, we deem it proper to say that the instruction taken by itself is not a correct statement of the law. The first part of the charge is correct, but it was only incumbent on the appellant to prove these facts by a preponderance of the evidence, and there is a vast difference between *clear* and convincing proof and a mere preponderance. The former expression is used in those cases where a mere preponderance of the evidence does not satisfy the requirements of the law. *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857.

The next error assigned is in giving the following instruction :

"In arriving at the amount of his damages, you are to say not only what they are, but whether the means used by the plaintiff to reduce the damages were such as an ordinarily prudent man would use. You cannot say that he should or should not have obtained any particular kind of treatment. As to that, he must alone be the judge. But when he has determined what treatment to take it will be for you to say if in making that determination he used the means that a reasonably prudent man would take to cure himself of his injury or to reduce the extent thereof under the same circumstances. If you find that he did not, and you can say that some other treatment would have brought about a cure or reduced the amount of his damages, and that that treatment was one that a reasonably prudent man would have adopted, then you must say that he has not used the care which a reasonably prudent man would use to reduce the damages, and you must take that into consideration in arriving at your verdict, and you fix the standard as to what a reasonably prudent man would do under such circumstances."

This instruction is not open to the criticism urged against it. It does not, as contended by counsel, hold the appellant responsible for the results of his physician's treatment. It simply exacts of him that degree of care which a reasonably prudent man would exercise under the same circumstances, and such we believe to be the duty imposed by law.

The next error assigned is in the giving of the following instruction :

"You are further instructed in this case that if from the evidence you find that the physician who was first called to attend the plaintiff after his injury was present in court during the trial of the cause and was not called by the plaintiff, you may take this fact into consideration; but in doing that you must also take into consideration the relations between the physician and the defendant, as to whether he was the acting physician on the part of the defendant or not, and whether, under all of the circumstances disclosed, as you shall find from the testimony, the plaintiff should have under

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such circumstances called the attending physician. In considering this matter you should take into consideration all of the facts as disclosed from the testimony and the surrounding circumstances."

The respondents contend that this instruction was not excepted to, and was not prejudicial to the plaintiff, inasmuch as it appears from the testimony that Dr. Axtell could give no evidence favorable to the appellant on the question of curvature of the spine (which was substantially the only issue in the case), because the symptoms did not appear until several days after Dr. Axtell attended him. If the instruction was not pertinent to the facts in the case it should not have been given, and we will not discuss the general principle of law involved in this part of the charge. Other errors are assigned, but they relate to matters that will not occur on a retrial.

For the errors above discussed, the judgment is reversed, and a new trial ordered.

MOUNT, C. J., FULLERTON, HADLEY, and CROW, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

[No. 6259. Decided December 11, 1906.]

MARY A. CUMMINGS *et al.*, *Appellants*, v. NICHOLAS SUNICH,
Respondent.¹

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CONFLICTING TESTIMONY. Discretion is involved in the granting of a new trial for newly discovered evidence where the evidence was conflicting or insufficient, and the same will not be disturbed on appeal where no abuse of discretion appears.

Appeal from an order of the superior court for King county, Yakey, J., entered January 29, 1906, granting de-

¹Reported in 87 Pac. 949.

fendant's motion for a new trial, after a judgment entered upon findings in favor of the plaintiffs, in an action of forcible entry and detainer. Affirmed.

McCafferty & Bell, for appellants.

Fred H. Peterson and *H. C. Force*, for respondent.

HADLEY, J.—This action was brought under the forcible entry and detainer statute, for the purpose of recovering possession of a certain lot in Seattle. The plaintiffs are not, and at no time have been, the owners of the lot, but for several years they were given parol permission, by a former owner, to occupy the lot with chicken coops and a chicken house or a small barn, for the purpose of raising chickens, but without payment of rent. They were so occupying it when the defendant purchased the lot from the former owner. The defendant at once notified plaintiffs that he had purchased the lot, and that he desired them to remove their structures therefrom, so that he might proceed to construct a house thereon for his home. The removal was not made at once, and the testimony conflicts as to just what occurred between the parties.

The testimony submitted by defendant is to the effect, that plaintiffs at once stated that they would remove at any time when defendant was ready to occupy for the purpose of building; that defendant built a fence between his lot and that of plaintiffs' adjoining, and placed material upon the ground ready for constructing his building, all without objection from plaintiffs; that when he was ready to begin construction, he removed the chicken coops and tore down the small building of the plaintiffs'; that Mrs. Cummings, one of the plaintiffs who was present, made no objection to the removal, but did object to the manner of removal: that Mr. Cummings, her husband and coplaintiff, was present and did not object in any manner. Mrs. Cummings testified at the trial, but her husband did not. She says the re-

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removal was without the consent of plaintiffs, and she testified that she asked defendant to leave the work of tearing down until her husband could assist in looking after the structures, saying that he was then at home sick and unable to be out. The cause was tried by the court without a jury, and the court found for the plaintiffs, awarding them possession of the lot in controversy, and also judgment for \$25 damages. The defendant moved for a new trial, and submitted affidavits of persons whose evidence was discovered subsequently to the trial, that they saw Mr. Cummings present at the time of the removal of the buildings and structures, and that he assisted the defendant in removing them. The motion for a new trial was granted, and the plaintiffs have appealed from the order granting the new trial.

The evidence was conflicting, and the affidavits submitted on the motion for new trial show new and material evidence as to whether respondent's entry was peaceable or forcible. That is a material question of fact in the case. It has been often held by this court that it will not disturb an order granting a new trial in the absence of an abuse of discretion, and that, when the evidence conflicts as to material facts, the granting of a new trial for insufficiency of the evidence, or because of newly discovered material evidence, will not be held to be an abuse of discretion. The above grounds, with others, were alleged in the motion for a new trial, and the order does not specify upon what ground the motion was granted. It will, therefore, be presumed that the court was influenced to grant the new trial by reason of the conflicting testimony, and proposed testimony, and that its discretion was exercised in that regard. If the ruling of the trial court were based upon a mere question of law, then this court might, in line with previous holdings cited by appellants, review the ruling for mere error, there being no discretion involved in such a ruling. This is, however, not such a case. Discretion is involved here, but we will not say, from the record in the

case, that the court abused its discretion. The judgment is affirmed.

FULLERTON, CROW, and DUNBAR, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6437. Decided December 12, 1906.]

JACOB ANDREWS, *Respondent*, v. UNCLE JOE DIAMOND
BROKER, *Appellant*.¹

APPEAL—TIME OF TAKING—FILING NOTICE AND BOND. An appeal will not be dismissed for failure to file the notice and bond within five days after the date of acceptance of service appearing thereon, when such date antedates the notice and bond and was evidently a clerical error.

APPEAL—FINALITY OF DECISION—JUDGMENT AS TO ONE DEFENDANT. An appeal will not be dismissed because taken from a judgment against only one of two defendants, when the other defendant had not appeared in the action at the time of the appeal.

PLEDGES—VALIDITY—MUTUALITY. The pawning of a ring for \$50. under an agreement that after one year it might be redeemed on the payment of \$75, is not unilateral by reason of the indefiniteness as to the time for redemption; and upon tender within a reasonable time, the pledgor is entitled to possession.

APPEAL AND ERROR—DECISION—TENDER—KEEPING GOOD—EVIDENCE—FINDINGS. In an action to redeem a pledge, in which the complaint alleged tender of the sum due the pledgee, but the findings of the court and the record on appeal fail to show whether the tender was kept good, judgment for the return of the goods will be reversed and remanded with instructions to determine whether the tender has been kept good; since if the tender was paid into court as alleged, the respondent should have made the record on appeal show such fact.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 9, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the

¹Reported in 87 Pac. 947.

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court without a jury, in an action of replevin to recover possession of a diamond ring pawned with the defendant. Reversed.

John E. Humphries and Geo. B. Cole, for appellant.

E. J. Grover and Allen, Allen & Stratton, for respondent.

HADLEY, J.—This is an action in replevin, to recover the possession of a diamond ring, or the value thereof, and its value is alleged to be \$250. Joseph Hoeslich and Uncle Joe Diamond Broker, a corporation, were made defendants. The complaint alleges, that in August, 1904, the defendant Joseph Hoeslich was conducting a loan and pawnshop business in Seattle, under the name of "Uncle Joe," and otherwise known as "Uncle Joe Loan Office;" that in said month the plaintiff pawned with said Joseph Hoeslich the ring in question, of which plaintiff was the owner, and that he received thereon the sum of \$50, with the understanding and agreement that the ring should be kept by said Hoeslich until said sum was repaid, it being further agreed that, if the sum was repaid within one year, then, in that case, plaintiff should pay \$15 for the use of the money, or \$65 in all; but if redemption was not made within a year, then plaintiff was to pay \$25 for the use of the money, or \$75 in all. It is also alleged, that said Hoeslich then delivered to plaintiff a receipt in writing, setting forth said agreement, which was numbered 9041, and that entry thereof was made in the books of said loan office; that thereafter, on the 2d day of November, 1905, plaintiff tendered the sum of \$75 to defendant, Joseph Hoeslich, at said loan office, and demanded the return of the ring, which was refused.

Further allegations are to the effect that, after the making of said pledge agreement, the said Hoeslich incorporated said loan office and business, under the name of "Uncle Joe Diamond Broker," such incorporation being simply for convenience and for the purpose of taking over and conducting

the business theretofore conducted by Hoeslich; that the business was so taken over, and that, in consideration for the transfer, the corporation assumed and agreed to pay all indebtedness incurred by said Hoeslich in conducting said business, and agreed to carry out and perform all contracts as to pledged property made by him. It is alleged that plaintiff also tendered to said corporation defendant the sum of \$75, and demanded the return of the ring, which was refused, and that he now tenders and pays the same into court. Issue was joined by the corporation defendant, and a trial was had before the court without a jury, resulting in a judgment against the corporation for the return of the ring to plaintiff or, in case return thereof cannot be had, judgment is awarded to plaintiff for \$250, the value of the property. This appeal is from the judgment.

A motion has been made to dismiss the appeal, on the ground that no bond on appeal was filed within five days after service of the notice of appeal. The notice of appeal bears date July 16, 1906, and the file marks show that it was filed the same day. The bond was also dated and filed July 16. The service clause appended at the foot of both the notice and bond, and signed by respondent's attorney, bears date July 9, which was seven days before the actual date of the notice and bond. The argument is made that the service date of the notice shows that the appeal was taken on the 9th, and that, as the bond was not filed until the 16th, it was not within five days after the appeal was taken. The service date of the notice is manifestly an error, since it antedates the instrument itself. The same error appears upon the bond, and the record satisfies us that the appeal was not taken until the 16th, and the bond was both served and filed on that day, which was within time to perfect the appeal.

The motion to dismiss the appeal is urged upon the further ground that the appeal is from a judgment against one of the defendants only, and that the action is still pending in

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the lower court upon issues joined by the defendant, Joseph Hoeslich. The record, however, shows that no appearance had been made and no issue had been joined by the defendant Hoeslich, when the judgment appealed from was rendered, and when the appeal was taken. Under such circumstances, appellant is entitled to prosecute the appeal from the judgment. It was a final judgment, and the other defendant was not a party to it. The motion to dismiss the appeal is therefore denied.

Appellant assigns errors upon the court's findings as to the facts. No verbatim report of the evidence was made at the trial, but a narrative statement of the testimony has been embodied in the statement of facts, and certified by the court. The findings made by the court substantially conform to the allegations of the complaint hereinbefore set out, and we think they are sufficiently supported by the evidence. We shall, therefore, not disturb such findings as were made by the court, but we shall hereinafter refer to a material fact upon which the court made no finding.

It is assigned that the court erred in its conclusion of law. It is argued that the conclusion was erroneous, for the reason that respondent cannot recover because of the statute of frauds. It is asserted that there was no agreement in writing, and that the agreement shown in evidence was not to be performed within one year. The complaint alleges that there was a written receipt given to respondent which stated the terms of the agreement. The court found that there was such, and we have said we think the evidence supported it. The objection raised on the ground of the statute of frauds is, therefore, not well taken.

It is further claimed that the contract was unilateral, and could not have been enforced by appellant, for the reason that no definite time was fixed for its performance, and that respondent was given the right to redeem at any time after one year, upon payment of \$75. Whatever may be said as to the time within which appellant might have enforced its

lien, it at least cannot be said that the contract gave it the right to withhold possession forever, if tender were made within a reasonable time. The ring was the property of respondent. The appellant had only a possessory lien thereon, and the tender of the amount of the lien was made soon after the expiration of a year. The contract was definite that redemption could be made within a year upon payment of \$65, and after that time for \$75. The tender of the latter sum was made within a reasonable time, and respondent, thereupon, became entitled to the possession. We think the contention that the contract was unilateral is not available to relieve appellant of liability, if the tender was kept good.

Appellant argues that there was no evidence of the tender having been kept good. The complaint alleges a tender to appellant and a refusal to accept it before suit, and also that it was brought into court. The court expressly found that there was a tender made on November 2, 1905, which was before suit was brought; but did not expressly find that the tender either was, or was not, kept good. There was evidence of the tender before suit, but we find no testimony that it was brought into court and kept good. The statement of facts, however, contains the following recital:

"The defendant admitted in open court that a tender, as alleged in plaintiff's complaint, had been made, and that it would be unnecessary to offer proof of that subject."

The above admission relieved respondent of the necessity of making proof upon the subject of tender "as alleged in plaintiff's complaint," which covered both the original tender and the bringing of the same into court. It did not, however, extend to an admission that the tender had been kept good until the time of the trial. Respondent's right to maintain the suit, and obtain the judgment, depended upon whether he had tendered the \$75, and had at all times kept the tender good. Appellant argues, with apparent seriousness, that the judgment is against it for the return of the ring or its value,

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and that respondent retains the \$75. Such a result would be manifestly wrong, and the condition of the record is such that we cannot tell whether the tender has been kept good so that it has at all times been available to appellant or not. If it was kept good so that appellant could have drawn it from the registry of the court at any time, respondent should have seen that the record so disclosed. In the absence of such a showing, the cause will have to be remanded for further proceedings.

The judgment upon the record before us is therefore reversed, and the cause remanded, with instructions to the trial court to vacate the judgment, and then proceed to ascertain if the tender in court was at all times kept good, and to enter an additional finding upon that subject. If it shall be found that the tender was kept good, then judgment shall be entered to the same effect as the former judgment. Otherwise judgment shall be entered dismissing the cause. Appellant is entitled to recover its costs upon this appeal.

FULLERTON, DUNBAR, and CROW, JJ., concur.

MOUNT, C. J. and RUDKIN, J., took no part.

[No. 6472. Decided December 12, 1906.]

MARY E. HOESCHLER *et al.*, Appellants, v. FRANK H. BASCOM
et al., Respondents.¹

APPEAL—RECORD—EXCEPTIONS. Where no exceptions are taken to findings of fact in an equitable action, and the findings support the conclusions and the judgment, the findings cannot be reviewed, and the statement of facts will be struck out on motion and the judgment affirmed.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 26, 1906, upon find-

¹Reported in 87 Pac. 943.

ings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Belden & Losey, for appellants.

Merritt, Oswald & Merritt and *William E. Richardson*, for respondents.

PER CURIAM.—This is an action for the reformation of a deed, for the eviction of the defendants from certain lots, for the restitution of said lots to the plaintiffs, and for the quieting of title of said lots in plaintiffs. The cause was tried by the court, and facts were found and conclusions of law made in favor of defendants, and judgment was rendered against the plaintiffs for costs.

Motion is made to strike the statement of facts and to affirm the judgment, for the reason that no exceptions were taken to any of the findings of fact or conclusions of law made by the trial court. It is not contended that all the findings of the court were erroneous; some of them were admitted by the pleadings, and some were stipulated to be correct. The record shows that no exceptions were taken, and it is the settled law of this state that, where no exceptions are taken to findings of fact, said findings are not subject to review by the appellate court, but they will be considered admitted facts. There was some contention made by the appellants in oral argument, that some of the conclusions of law were not justified by the facts found. But an investigation of the record convinces us that the conclusions of law and the judgment entered were amply justified by the facts found.

The motion will be sustained and the judgment affirmed.

[No. 6175. Decided December 13, 1906.]

PHILIP L. GRAVES, *by Marie L. Graves, his Guardian Ad Litem, Respondent*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.¹

ELECTRICITY—NEGLIGENCE—INJURY TO TRESPASSERS. An electric company is not liable to a boy who was injured while climbing after bird's nests, up the steel lattice work of a high pier supporting a public bridge, by reason of coming in contact with one of the company's live electric wires, which was thirty feet from the ground, properly insulated and eighteen inches from the pier, where the company had no notice that children were in the habit of climbing up such piers; since the place was not one where the public might rightfully go for business or pleasure, nor one that was rendered attractive to children by any act or structure of the company, and since the company could not have reasonably anticipated the presence of children at such place.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 10, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for personal injuries sustained through contact with a live electric wire. Reversed.

H. M. Stephens, for appellant, contended, among other things, that the doctrine of the turntable cases should not be extended. *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636; *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. 847; *Paolino v. McKendall*, 24 R. I. 432, 53 Atl. 268, 96 Am. St. 736, 60 L. R. A. 133; *Erickson v. Great Northern R. Co.*, 82 Minn. 60, 84 N. W. 462, 83 Am. St. 410, 51 L. R. A. 645; *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. 884, 55 L. R. A. 911; *Brinkley Car Works & Mfg. Co. v.*

¹Reported in 87 Pac. 956.

Cooper, 70 Ark. 331, 67 S. W. 752, 57 L. R. A. 724; *Louisville etc. R. Co. v. Hart*, 24 Ky. Law 1123, 70 S. W. 830; *Hughes v. Boston etc. R. Co.*, 71 N. H. 279, 51 Atl. 1070, 93 Am. St. 518; *Peninsular Trust Co. v. Grand Rapids*, 131 Mich. 571, 92 N. W. 38; *Simonton v. Citizens' Elec. L. etc. Co.*, 28 Tex. Civ. App. 330, 67 S. W. 530; *Loftus v. Dehail*, 133 Cal. 214, 65 Pac. 379; *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. 106; *Walsh v. Hayes*, 72 Conn. 397, 44 Atl. 725; *Chesley v. Rocheford*, 4 Neb. 768, 96 N. W. 241; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Conway v. Vezzetti*, 69 N. J. L. 235, 54 Atl. 226; *Smith v. Hopkins*, 120 Fed. 921; *McCabe v. American Woolen Co.*, 132 Fed. 1006; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365; *Klix v. Nieman*, 68 Wis. 271, 32 N. W. 223, 60 Am. Rep. 854; *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. 481, 55 L. R. A. 310. The respondent was not a licensee, but a trespasser to whom the appellant did not owe any duty. 15 Cyc. 475; 10 Am. & Eng. Ency. Law (2d ed.), pp. 871, 872; *Bennett v. Railway Co.*, 102 U. S. 577, 26 L. Ed. 235; *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526; *Hector v. Boston Elec. L. Co.*, 161 Mass. 558, 57 N. E. 733, 55 L. R. A. 554; *Id.*, 174 Mass. 212, 54 N. E. 539, 75 Am. St. 300; *Cumberland Tel. etc. Co. v. Martin's Adm'r*, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 105 Am. St. 229, 63 L. R. A. 469; *New Omaha etc. Elec. L. Co. v. Anderson (Neb.)*, 102 N. W. 89; *Chesley v. Rocheford*, *supra*; *Fredenburg v. Baer*, 89 Minn. 241, 94 N. W. 683; *McCaughna v. Owosso & Corunna Elec. Co.*, 129 Mich. 407, 89 N. W. 73, 95 Am. St. 441; *Sullivan v. Boston etc. R. Co.*, 156 Mass. 378, 31 N. E. 128; *Sias v. Lowell etc. St. R. Co.*, 179 Mass. 343, 60 N. E. 974; *Augusta R. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203; *Rowe v. Taylorsville Elec. Co.*, 213 Ill. 318, 72 N. E. 711; *South Side Elevated R. Co. v. Nesvig*, 214 Ill. 463, 73 N. E. 749. The respondent failed to show any defective insulation. *Smith v. East End Elec. L. Co.*, 198 Pa. St. 19, 47 Atl. 1123.

O. C. Moore and *F. T. Post*, for respondent, *inter alia*, contended that plaintiff's theory of the case is that the law imposes upon the defendant, dealing in or handling such a highly dangerous element as electricity, the duty of exercising the highest degree of care to protect persons from danger in all places where the general public may rightfully go for purposes of business or pleasure. *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 96 Am. St. 902; *Anderson v. Seattle-Tacoma Interurban R. Co.*, 36 Wash. 387, 78 Pac. 1013, 104 Am. St. 962; *Rush v. Spokane Falls & N. R. Co.*, 23 Wash. 501, 63 Pac. 500; *Roberts v. Spokane Street R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184. *Sic utere tuo ut alienum non laedas*. Jaggard, Torts, p. 832; *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. 936. It was the duty of the defendant to keep the wires perfectly insulated. Joyce, Electrical Law, § 445; *Thomas v. Wheeling Elec. Co.*, 54 W. Va. 395, 46 S. E. 217; *McLaughlin v. Louisville Elec. L. Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Nelson v. Branford L. & W. Co.*, 75 Conn. 548, 54 Atl. 303; *Denver Consol. Elec. Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39; *Metropolitan Street R. Co. v. Gilbert*, 70 Kan. 261, 78 Pac. 807; see, also, *Consolidated Elec. L. & P. Co. v. Healy*, 65 Kan. 798, 70 Pac. 884; *Nelson v. Branford L. & W. Co.*, *supra*; *Commonwealth Elec. Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052; *Daltry v. Media Elec. L. etc. Co.*, 208 Pa. 414, 57 Atl. 1134; *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 48 Am. St. 114, 29 L. R. A. 596; *Brown v. Edison Elec. etc. Co.*, 90 Md. 400, 45 Atl. 182, 78 Am. St. 442, 46 L. R. A. 745; *Potts v. Shreveport Belt R. Co.*, 110 La. 1, 34 South. 103, 98 Am. St. 452; *Bourke v. Butte Elec. Co.* (Mont.), 83 Pac. 470. The plaintiff had a right to assume or believe that the wires were safe. *Perham v. Portland General Elec. Co.*, 33 Ore. 451, 53 Pac. 14, 24, 72 Am. St. 730, 40 L. R. A. 799; *Clements v. Louisiana Elec. L. Co.*, 44 La. Ann. 695, 11 South. 51, 16 L. R. A. 43; *Ander-*

son v. Seattle-Tacoma Interurban R. Co., and *Thomas v. Wheeling Elec. Co.*, *supra*. The objection that the plaintiff was a trespasser or that the company could not have anticipated that he would come in contact with the wires is answered in *Wittleder v. Citizens' Elec. etc. Co.*, 47 App. Div. 548, 62 N. Y. Supp. 297 and *Commonwealth Elec. Co. v. Melville*, *supra*. Appellant's negligence in permitting a dangerously charged wire to remain in close proximity to the bridge was the proximate cause of the accident. *Walters v. Denver Consol. Elec. L. Co.*, 12 Colo. 151, 54 Pac. 960; *Potts v. Shreveport R. Co.*, and *Wittleder v. Citizens' Elec. etc. Co.*, *supra*.

Root, J.—This appeal is from a judgment against appellant for personal injuries sustained by respondent, a boy fifteen years of age. The complaint sets forth that respondent was injured by reason of contact with the wires of appellant, which were charged with electricity; that the power house of appellant is immediately east of what is known as the Monroe street bridge, which spans the Spokane river, and connects Monroe street on the north and south sides of said river; that said bridge is a public thoroughfare, and is the property of the city of Spokane; that the driveway, roadway and foot paths of said bridge are at the height of about one hundred feet from the water in said river; that said bridge is supported by piers built of plates of steel at a slight angle, with straps to and from such plates, set at an angle, so that same can be used as a ladder, which alleged ladders are inviting and attractive to small boys to climb and play thereon; that some of said piers and alleged ladders are near the power house of appellant; that appellant's electric wires are in close proximity to one of said piers; that by reason of the construction of said piers in said ladder-like form, in close proximity to said river, and that at certain seasons of the year pigeons are in the habit of nesting and rearing their young on the beams and around the top of said bridge, said bridge and the supports thereof were attractive to small boys, and

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that small boys frequented same for playing and climbing thereon, and had done so for a long time, and that appellant knew, or should have known, thereof.

It is further alleged that on March 10, 1905, respondent climbed one of said piers, and when about thirty feet high, something touched his coat, and he involuntarily put out his hand and took hold of a live wire and received the shock and injury complained of, and that as respondent fell he came in contact with other wires; that his fingers and thumb had to be amputated. A demurrer was interposed to the complaint, and overruled. Appellant answered, denying the material allegations of the complaint, except formal matters and those covered by the following admissions:

"That respondent was at least fifteen years old at the time of the accident; that appellant is a corporation and engaged in manufacturing electricity and furnishing and selling same; that its power house is on the south bank of the Spokane river, immediately east of the piers of the Monroe street bridge; that the top of said bridge is used as a public thoroughfare; that the roadway or top of said bridge is at a great height from the ground and water underneath same; that said bridge is held in position by a series of steel supports of great height; that the said supports, in some places, are held together by steel plates or slats of steel, which slats or plates are run from one support to another on an angle; that on and prior to March 10, 1905, poles and wires were maintained at the place complained of, and that some of the wires were constantly charged with electricity."

The defense of contributory negligence was pleaded, and it was alleged that appellant had used the best means of insulation known to science.

There is but little controversy between the parties as to the character of the bridge and the location and use of the electric wires. It appeared from the evidence that pigeons were in the habit of nesting about the bridge, and that boys sometimes climbed the piers in order to catch the pigeons or find their nests, and sometimes as a matter of sport and

in playing such games as "Follow the leader." It appears that near the foot of the piers, on the other side of the river, there were good play grounds, but such was not the case on the side where respondent was injured, although boys were frequently about there. It was in evidence that boys were seen playing about the bridge at different times during the period of two or three years immediately prior to this accident. It does not appear that they were in the habit of climbing the pier near which the wires were, and from which respondent fell. The evidence does not show that appellant had actual knowledge of boys climbing these piers, nor that there was such an amount of climbing near the wires as would impute knowledge to it thereof. Respondent's witness McCormick, bridge foreman and inspector for the city, testified that the bridge was one hundred and thirty-eight feet above the water in the river; that the lattice work was sharp and hard on the feet and hands, and did not make a good ladder; that he had sometimes seen boys around the bridge, usually at the other end, and had driven them away; that he had never seen boys on any of the piers higher than twenty-three or twenty-four feet. This evidence did not seem to be disputed in any material part. Another of respondent's witnesses, one Rogers, a policeman of the city of Spokane, testified that his duties required him to be near this bridge; that he had seen boys playing about the bridge off and on for two or three years; that he had orders to chase them away, and did so. He had never seen them climb the piers, but had seen them on top of the bridge at each end; that he had orders to keep the boys away from there. One Gannon, a witness for the respondent, had seen boys climbing all over the bridge, but usually at places other than where this accident occurred. He worked for the city and was in the habit of chasing the boys away. Respondent testified that he was playing "hookey" from school; that he saw some pigeons flying about the bridge, and climbed one of the piers; that

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he felt something touch the back of his coat, and reaching around, and without seeing the wires, involuntarily took hold of one, and was thrown to the ground by the shock, his hand being badly burned; that he could have seen the wire had he looked. He stated that he had never, previous to that time, been under or climbed about the bridge.

It appears from the evidence that the electric wires do not run exactly straight or parallel with the bridge, but are nearer to this particular pier than to any other. Respondent was thirty or more feet from the ground when he fell. The plates or strips of steel were twelve to fifteen inches long, two or three inches wide, one-fourth of an inch thick, with sharp corners or edges, and fastened upon the steel piers so as to form sharp angles, rather than being attached at right angles, as is the case with the rungs of an ordinary ladder. The wire nearest to the pier was fifteen and one-half inches distant therefrom, and was on the lowest arm of the electric pole, and was insulated and carried comparatively low voltage. The next wire above was eighteen inches from the pier. From the complaint and evidence we think it unquestionably appears that respondent took hold of a wire some distance above those two wires, which was heavily charged with electricity, and some thirty inches from the bridge pier.

It is urged by appellant that the complaint does not state a cause of action, and that the evidence introduced is not sufficient to support any verdict or judgment in favor of respondent. It is contended that the respondent was a trespasser, toward whom the appellant owed no duty other than to avoid wilful injury; that its wires were being used for a legitimate purpose, in a place where they had authority to place them, and that there is nothing in the circumstances alleged or proven sufficient to fix liability upon it for the injuries sustained by respondent. Respondent meets these contentions of appellant by the assertion of several propositions, which we will consider *seriatim*.

He urges:

(1) "The law imposes on persons manufacturing and dealing in or handling highly dangerous elements and substances, such as electricity and dynamite, the duty of exercising the highest degree of care to protect persons from danger in all places where the general public may rightfully go for purposes of business or pleasure."

Accepting this as a correct statement of the law, let us apply it to the facts of this case. Can we say that "the general public may rightfully go, for purposes of business or pleasure," up or down the side of a high and almost perpendicular pier of a public bridge across a river, climbing upon the diagonally attached slats of steel, as did respondent? Was it ever contemplated that such a use should be made of the piers of this bridge by the general public? We apprehend not. The bridge was constructed for the purpose of furnishing the public a means of crossing a goodly sized river. It was intended that the public should walk or ride upon the roadway at the top of said bridge. The lattice work upon the sides of these piers was not intended to constitute ladders, or furnish means of access to or from the top of the bridge. The public was not invited nor expected to use such lattice work for such a purpose. No one, other than an employee or agent of the city, entrusted with some duty in connection with the inspection, supervision, care, or repairing of said bridge, would have any authority to climb up or down said lattice work. This being true, it follows that respondent, as one of the general public, had no authority justifying his presence at the place where he was injured. It is not pretended that he was an employee or agent of the city, or that he had any authority therefrom to be there. He was not even a licensee, but was a mere trespasser. It will, therefore, be seen that the proposition of law urged by respondent, as above set forth, cannot avail him under the circumstances of this case.

(2.) Respondent urges, "that it may always be assumed that every person has performed his duty, under the law, and hence that the placing of wires or other electrical apparatus in close proximity to places or structures where persons rightfully go for business or pleasure constitutes an implied assurance of safety, and an invitation to take hold of, or come in contact with, such wires, if such persons may for any reason choose to do so."

This proposition of law, even if sound—which, in its entirety, we do not believe—would not apply to the facts of this case, for the reason, as already stated, that respondent did not "rightfully go, for business or pleasure," up or down this pier. People who have occasion to use wires highly charged with electricity must be held to a high degree of care, and when they place those wires in close proximity to places or structures where other persons may rightfully go for business or pleasure, it is incumbent upon them to use a high degree of care to prevent any person from being injured by coming in contact therewith. But we cannot go to the extent of saying that the presence of such wires in such a place constitutes an invitation to take hold of, or come in contact with, them. When a person, rightfully or wrongfully in such a place, sees a wire which he knows may be highly dangerous, it is his duty to avoid coming in contact therewith, rather than to accept its presence as an invitation to make such contact.

(3.) Respondent urges that this bridge, and the piers thereof and immediate surroundings, and the presence of the pigeons, rendered the situation an attractive one for boys, and that the appellant was under obligations to keep its dangerous wires out of the reach of said boys, or to keep them so completely insulated that they would be harmless in case a boy should take hold of, or come in contact with them. While attorneys for respondent assert, in their brief, that they do not rely upon the "turntable doctrine," it would seem that they invoke principles that are nearly akin thereto. It

will be noticed that it is not alleged, proven, or urged that respondent was allured to the place of his injury by reason of any attraction connected with any structure, device, or property of appellant. The things that constituted the attraction, which it is claimed drew him to this place, were features connected with the river, the bridge and the pigeons, and were matters for the existence of which appellant was not responsible.

(4.) It is urged by respondent that, while he may have been a trespasser as to the owner of the bridge, the city, he was not a trespasser as against the appellant. If, under given circumstances, a person in maintaining a dangerous agency upon his own premises would not be liable for injuries therefrom to a trespasser upon said premises, and would not be holden to anticipate the presence of such trespasser, we do not see why he should be holden to foresee the presence of a trespasser upon adjoining property, or why he should be under obligation to guard against the possible presence of one trespassing upon the adjoining premises so near as to be injured by said dangerous agency. Ordinarily a person whose duty it is to furnish protection to others against a dangerous agency fully complies with the law when he provides such a protection as will safely guard against any contingency that is reasonably to be anticipated. He is not legally bound to safeguard against occurrences that cannot be reasonably expected or contemplated as likely to occur. *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98; *Johnston v. Northern Lum. Co.*, 42 Wash. 230, 84 Pac. 627; *Daffron v. Majestic Laundry*, 41 Wash. 65, 82 Pac. 1089.

If the appellant had constructive notice that boys were playing about, and sometimes climbing upon, the bridge, the fact of the city's officers being there to chase them away would likewise be known. The carrying of dangerous electric wires upon high poles, or the burying of them in trenches, readily occurs to one as an appropriate requisite

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for the safety of people who may have occasion to come into the vicinity of said wires. But if a boy, through curiosity, should dig up a wire buried in the ground, or should climb to the top of a high pole, and, in either case, take hold of a "live" wire and be injured, would it be seriously contended that this was a circumstance which the owner of the wire should be held to have anticipated and guarded against? To be sure, it would be a possible contingency; but would it be so probable that any reasonably prudent person would feel it necessary to be guarded against?

The respondent invokes the rule that one must so use his own as not to injure another. This is a wholesome and salutary principle of law; but it must have some limitations. It does not mean that a man must operate his machinery, appliances, or other agencies in such a manner as to absolutely insure and guarantee the safety of every other person. Such owner, in the operation of such agencies, is held to use that degree of care, foresight, and discretion which a person of ordinary care and prudence would use under the same circumstances. As a matter of law, it may be said that a person of ordinary care and prudence, in the operation of an agency so dangerous as electricity, would and should be exceedingly careful, and so arrange the means of handling and transmitting this powerful and mysterious element as to protect from harm any person or persons whom he might reasonably expect to be in a position to receive harm therefrom. But to say that the owner or operator of an electric plant should foresee and anticipate the presence of children or others in places where the ordinarily prudent, careful, and foreseeing person would not expect, or deem it likely for them to be, would impose a burden and responsibility for which there is no justification in law.

We do not think it can be said that this appellant should have anticipated that boys would climb up this almost perpendicular pier, and from it reach over and take hold of the

electric wires strung upon its poles, thirty or more feet above the ground, or that the city's watchmen and other servants there stationed would permit such an occurrence. If the company's responsibility extended this far, it would be difficult to say where a limit could be fixed. In this state we see electric wires stretched on poles through our towns and cities, and along highways, through farms, orchards and forests in the country. Can it be held that companies operating these wires must keep them out of reaching distance of every high tree, building, fence, wall, pole, or other place of elevation into, or upon, which a boy may possibly be allured by birds' nests or other attractions? Suppose birds should build their nests under the eaves of a sawmill that had a ladder attached to its side, and a boy, attracted by said ladder and birds' nests, should climb the ladder and purposely or inadvertently thrust his hand through a window against a running saw in the upper story of said mill, would the owner of the mill be liable for the boy's injury? Suppose a merchant should keep dynamite, in order to have it out of the way of people, upon the roof of his store, and some boy, without the consent and against the wishes of the owner of adjoining premises, should climb a tree thereon for birds and, while up in the tree, reach over and explode some dynamite, would the owner thereof be holden for the injury thereby occasioned to the boy? Regardless of what the name may be, it seems to us that the contention of respondent is an invocation for an extension of the "turntable doctrine" beyond the limits permitted by the law, as heretofore announced by this and the great majority of the courts.

In the case of *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, this court said:

"Appellant also cites what are known as the 'turntable cases.' These cases are based upon the theory that a turntable is a machine of such a nature as to attract children to play with it, and, being inherently dangerous for children to handle, negligence is predicated upon the failure to lock

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it or securely fasten it so that it cannot be moved by children. The same principle has been applied where other structures or conditions existed, but the doctrine has not been uniformly adopted by American courts, and it has, indeed, been severely criticized. In *Beach on Contributory Negligence* (3d ed.), § 51a, the author observes that the trend of the more recent decisions is against it, and many cases are cited. This court applied the rule in a turntable case in *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446 (25 Pac. 335, 22 Am. St. Rep. 169); but, in view of the more modern tendency of the courts, we should, however, hesitate to extend the rule as one of general application to other conditions. For especially forcible reasoning upon this subject we refer to *Delaware L. & W. R. R. Co. v. Reich*, 61 N. J. Law 635 (40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727). The respondent in the case at bar had not placed upon its premises a dangerous machine or device, that was in its nature and at once particularly attractive to children. The deceased boy neither meddled with nor was he injured by any such instrument. The attractive thing which it is claimed respondent permitted upon its premises was the show."

A case involving similar consideration was that of *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955, where the court spoke as follows:

"To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants or adults, regardless of how they may gain admission, would be destructive of all industry and all property rights."

Discussing the doctrine now invoked by respondent, this court, in the case of *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. 847, employed this language:

"Whatever may be said of the wisdom of that rule, as applied to the one condition, established as it was by judicial decisions, but severely criticized by others refusing to follow it, still, when we contemplate its extension to the manifold other relations and conditions which arise in the affairs of

life, we must see that it would be productive of litigation to such an extent as would greatly endanger the security of property interests. It is aptly suggested by respondent, in his brief, that swings, teeter boards, lumber piles, fences, gates, walls, buildings, trees, hanging on vehicles, and numerous other similar things are attractive to children. It will, therefore, be seen that, if this doctrine should be made one of general application for the protection of children against everything that may be especially attractive to them, it would result in requiring all property holders to assume toward children who may be attracted to their premises a degree of duty and care which properly belongs to parents or guardians."

The unfortunate accident which befell respondent was an unusual and extraordinary one, which we do not believe appellant could reasonably have anticipated. Under the pleadings and all of the evidence, construed as favorably as possible in behalf of the respondent, we think liability on the part of appellant for this boy's injury is not established.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., DUNBAR, RUDKIN, FULLERTON, HADLEY, and CROW, JJ., concur.

[No. 6253. Decided December 13, 1906.]

THE STATE OF WASHINGTON, *on the Relation of J. B. Lippincott, Respondent, v. THE CITY OF SPOKANE et al., Appellants.*¹

ATTORNEY AND CLIENT—COMPROMISE OF SUIT—STIPULATION—AUTHORITY OF ATTORNEY—RATIFICATION—ESTOPPEL BY ACCEPTING BENEFITS. By accepting the benefits of a stipulation made by its attorney in compromising a suit to foreclose sewer and grade assessments, a city is estopped to question the authority of the attorney, or the va-

¹Reported in 87 Pac. 944.

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Opinion Per RUDKIN, J.

lidity of the judgment confessed, by reason of the fact that the settlement and judgment included the discharge of taxes and assessments not involved in the pending action.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 27, 1906, granting a writ of mandate to compel the cancellation of city tax liens and assessments, upon sustaining a demurrer to an affirmative defense in mandamus. Affirmed.

J. M. Geraghty and *Alex. M. Winston*, for appellants.

P. F. Quinn, for respondent.

RUDKIN, J.—This was an application for a writ of mandamus against the city of Spokane and its treasurer. The facts upon which the application was based are as follows: For some time prior to the 23d day of January, 1903, the relator was the owner of lot 1 of block 32 of Railroad Addition to the city of Spokane. The city claimed liens against the property for delinquent taxes for the year 1892, for the Howard street sewer improvement and for the Second street sewer and grade improvement, the validity of which was denied by the relator. On the above date an action was commenced in the superior court of Spokane county by the city of Spokane, against the relator, and others, to foreclose the lien of the Second street sewer and grade assessment. On the 18th day of June, 1904, a compromise was arranged through the attorneys representing the city and the relator, whereby it was agreed that, upon the payment of the sum of \$173.79 into court by the relator, the pending action should be dismissed, and that said sum should be received by the city in full payment and satisfaction of all liens and assessments against the property, and a written stipulation was prepared in conformity with this agreement. On the same date an order was entered by the court, reciting the stipulation and the payment of the \$173.79 pursuant to its terms,

and directing the city to cancel upon its records all taxes and assessments against the property. The city of Spokane and its treasurer have refused to cancel the taxes and assessments as directed by the court. The answer admits all the allegations of the petition, except the averment that the taxes and assessment were invalid, and alleges affirmatively that the corporation counsel of the city had no authority to enter into the stipulation or to confess the judgment as rendered. The court sustained a demurrer to this affirmative defense, and the defendants declining to plead further, a peremptory writ of mandate was directed to issue as prayed. From this order the defendants have appealed.

The appellants contend, first, that the court was without jurisdiction to cancel taxes or assessments not involved in the action in which the foregoing stipulation was filed; and second, that the corporation counsel had no authority to enter into the stipulation or to confess the judgment, in so far as taxes and assessments not involved in the pending action were concerned. We do not think that these defenses are available to the appellants at this time. The appellants cannot claim under the judgment and in opposition to the judgment. They cannot accept the fruits of the stipulation and, at the same time, deny the authority of the officer who entered into the stipulation. As soon as the city discovered that its corporation counsel had compromised the taxes, entered into the stipulation, and confessed a judgment partly in its favor and partly against its interest, two courses were open to it. It might refund the money paid and move against the judgment, or it might ratify and confirm what had been done. It could not ratify in part and reject in part; and having received the money paid under the stipulation and judgment, it is bound by its election, and will not now be heard to question either the authority of its officer or the validity of the judgment under which the money was paid and received.

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Opinion Per DUNBAR, J.

There is no error in the record and the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, DUNBAR, and CROW, JJ., concur.

[No. 6446. Decided December 13, 1906.]

JOHN STONE *et al.*, *Appellants*, v. JAMES CREWDSON,
Respondent.¹

DAMAGES—ASSAULT CAUSING MISCARRIAGE—PROXIMATE CAUSE OF INJURY—EVIDENCE—WEIGHT AND SUFFICIENCY. In an action for damages by reason of a miscarriage alleged to have been the result of an assault, a nonsuit is properly granted where the time that intervened—thirty-three days—was, according to the expert testimony, greatly in excess of the ordinary time, and the cause of the miscarriage could not be determined without entering the realms of speculation and conjecture.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 23, 1905, in favor of the defendant, dismissing an action for damages by reason of an assault, upon granting a nonsuit, after a trial on the merits before the court and a jury. Affirmed.

Richardson, Roche & Onstine, for appellants.

Hamblen, Lund & Gilbert, for respondent.

DUNBAR, J.—This action was brought by the appellants, husband and wife, to recover damages on account of personal injuries alleged to have been suffered by one of the appellants, Irene Stone. The complaint alleged, in substance, the following facts: That on or about the 2d day of July, 1904, the defendant came to the home of the plaintiff Irene Stone's father and mother, in the town of Medical Lake, where she was visiting, and without any reason or cause, wrongfully, wickedly, maliciously, and brutally assaulted the

¹Reported in 87 Pac. 945.

plaintiff Irene Stone, and conducted himself in a boisterous, threatening and noisy manner, violently shaking and swinging his hands and his fists in and around and about the person and face of the plaintiff Irene Stone, and her mother, Mrs. Margaret E. Olds, and swearing and cursing at them in a very loud and boisterous manner, heaping opprobrious epithets upon them and calling them vile names, which are specified in the complaint; and that, by such action, he severely frightened plaintiff Irene Stone, who was then in a delicate condition, and caused her to faint away and become unconscious and her nervous system to be greatly shocked and injured, to such an extent as to cause her to have a miscarriage shortly after; and the injuries flowing from such miscarriage are set forth in the complaint. Judgment was asked for \$20,000 damages. At the close of the plaintiffs' testimony, the defendant challenged the sufficiency of the evidence, on the ground that it was not sufficient to justify a recovery. This motion was sustained, and judgment entered in favor of the defendant for costs.

We have examined the testimony in this case and, from such testimony, including the medical expert testimony, we think that the judgment of the court must be sustained—that there is no proof that the negligent acts of the respondent were the proximate cause of the miscarriage from which the alleged injuries followed. Without undertaking to reproduce the testimony of the doctors, who were called by the appellants and upon whose testimony this case must be determined, it shows that any one of many intervening acts and happenings might have caused the same result. The time between the alleged cause and the actual miscarriage—thirty-three days—was, according to the expert testimony, greatly in excess of the ordinary time in such cases; and the answers of the physicians to questions propounded to them, which were based upon the testimony, convince us that the jury could not have determined the proximate cause of the

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miscarriage without entering into the realms of speculation, conjecture, and guesswork, and this they are not empowered to do, under the rule announced by this court in *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118, and *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831.

We are unable to discover that the court committed any prejudicial errors in the admission or rejection of testimony. The judgment is affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN and CROW, JJ., took no part.

[No. 6467. Decided December 13, 1906.]

C. SCHURRA, *Respondent*, v. BUFFALO-PITTS COMPANY,
Appellant.¹

CONTRACTS—CONSTRUCTION—PRINCIPAL AND AGENT—DURATION OF AGREEMENT—QUESTION FOR JURY. In an action by an agent for commissions for sales made in January, 1902, under a contract "for season of 1901," wherein the principal agreed to furnish machines for all sales made "prior to November 1st, 1901," the duration of the contract, or whether it was extended, was properly submitted to the jury, where there was evidence of letters, acceptance of sales, and appropriation by defendant of the proceeds, justifying a finding that the contract was extended; as employment after expiration of the term is presumed to continue at the original rate and not upon a *quantum meruit*.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered August 25, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover an agent's commissions. Affirmed.

Danson & Williams, for appellant.

William E. Richardson and *Lawrence Jack*, for respondent.

¹Reported in 87 Pac. 945.

DUNBAR, J.—This action is brought to recover commissions alleged to be due respondent on sales made by the respondent while acting as the agent of the appellant. Three causes of action are set forth in the complaint, all based on a contract of agency. The contract has, at its top, the following words: "For Season of 1901." The first obligation of the appellant in the contract is as follows:

"1st. To furnish to the said party of the second part such number of engines, threshers, swinging stackers, horse-powers, and their appurtenances (manufactured by it, the Buffalo Pitts Company), as the said party of the second part may be able to sell, as its special agents, and in accordance with the terms stipulated herein, prior to November 1st, 1901; the said party of the first part reserving to itself the right, in case it shall not be able to fill the orders of the said party of the second part, to restrict the said party of the second part to such number of machines, and parts of machines, as it may be able to supply."

The complaint shows that the second and third causes of action were for commissions on sales of agricultural implements for the benefit of defendant, after the 1st of November, 1901, viz., on the 17th day of January, 1902, and it is these causes of action that are contested by the appellant here. Appellant demurred to the complaint, which demurrer was overruled; objected to the introduction of any evidence as to the sales made in 1902; and, upon respondent's resting, entered a challenge to the sufficiency of the evidence, which was also overruled. The same objection was made after all the evidence had been introduced, which was overruled. In its instructions the court left the construction of the contract of agency, and the matter of its duration, to the jury, and the jury returned a verdict for respondent in the sum of \$635. Judgment was entered thereon, and appeal is taken from such judgment.

The pertinent contention in this case is, that the respondent was not entitled to recover on the contract for merchandise sold after the alleged expiration of the contract in No-

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vember, 1901. This action, it may be conceded, is brought upon the contract, and it may also be conceded that, where an action is brought on an express contract, recovery cannot be had on a *quantum meruit*. No proof was attempted to be made of the reasonable value of the services upon the trial, but the respondent relied entirely on the stipulated compensation mentioned in the contract. If the contract had ceased to be in force by reason of the expiration of the time, then the respondent could not recover upon the second and third causes of action; if it was still in force, he could recover upon such cause of action, and the judgment is right. It will not be denied that the rule contended for by the appellant, that a contract of agency terminates with the expiration of the time set in the contract, is elementary, if no other circumstances are taken into consideration or brought to bear upon it. But a contract may be extended by the actions and agreements of the parties to the contract, not incorporated in the contract itself.

The appellant assigns error of the court in submitting the construction of the contract in question to the jury. Ordinarily, the question of the meaning of a written contract is one of law for the court, and not for the jury. But this contract is not altogether unambiguous, and the time might be construed to be a limitation, on the part of the appellant, as to the machinery furnished. In any event, certain acts of the appellant were introduced in testimony, and the jury had the right to construe the contract, or to determine whether the contract was in force when the goods were sold, with reference to said acts. We think the jury was justified in determining from the testimony in this case, the letters introduced in testimony, the acceptance of the sales made by the respondent, and the appropriation by appellant of the benefit of said sales, that the contract was extended, that both parties treated the contract as extended until after these sales were made, and that the appellant ought to be bound by

such extension. While, as we have indicated, the general rule is that a contract of agency ceases at the time prescribed in the agreement, yet, it is equally well established that, if an agent employed at an agreed price for a certain time continues in the same employment after the expiration of the term, without any new agreement, the presumption of law is that he continues at the original rate of compensation, and that there can be no recovery upon a *quantum meruit*. 1 Am. & Eng. Ency. Law (2d ed.), 1161, and cases cited.

It was also decided, in *Sines v. Superintendents of Poor*, 58 Mich. 503, that where, under contract for a year's service, the employee has gone on from year to year, and at the end of the year is allowed to go on without objection, a presumption arises which will warrant a jury in finding that the parties to the contract have assented to its continuing in force for another year. To the same effect are *Tallon v. Grand Portage Copper Min. Co.*, 55 Mich. 147, 20 N. W. 878, and *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56. This rule, we think, is a proper one, as its tendency is to insure justice.

We discover no reversible error on the part of the court in the instructions given, or in the admission or rejection of testimony. The judgment is therefore affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN and CROW, JJ., took no part.

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Opinion Per Curiam.

[No. 6234. Decided September 25, 1906.]

WALTER G. BAKER *et al.*, *Respondents*, v. WASHINGTON IRRIGATION
COMPANY, *Appellant*.¹

Appeal from a judgment of the superior court for Yakima county,
Rudkin, J., entered January 10, 1905. Affirmed.

E. T. Blaine and *Ira P. Englehart*, for appellant.

William B. Bridgman, for respondents.

PER CURIAM.—For the reasons assigned in *Atkinson v. Wash-
ington Irrigation Co.*, *ante* p. 75, 86 Pac. 1123, the judgment in this case
will be affirmed.

[No. 6304. Decided November 9, 1906.]

WALTER M. FRENCH, *Respondent*, v. AJAX OIL & DEVELOPMENT
COMPANY, *Appellant*.²

Appeal from a judgment of the superior court for King county,
Tallman, J., entered April 9, 1906. Reversed.

W. F. Hays and *Fred Page-Tustin*, for appellant.

Allen & French, for respondent.

PER CURIAM.—For the reasons given in the opinion in *French v.
Ajax Oil & Development Company*, No. 6303, *ante* p. 305, 87 Pac. 359,
the judgment in this cause will be reversed and remanded with in-
structions to proceed as in that case.

[No. 6315. Decided November 9, 1906.]

R. F. COATES *et al.*, *Respondents*, v. C. K. MCCOY, *Appellant*.³

Appeal from a judgment of the superior court for King county,
Griffin, J., entered March 26, 1906. Affirmed.

E. A. Vinsonhaler, for appellant.

Higgins & Hall, for respondents.

¹Reported in 86 Pac. 1125.

²Reported in 87 Pac. 360.

³Reported in 87 Pac. 1150.

[No. 6294. Decided December 12, 1906.]

STANDARD ICE COMPANY, *Respondent*, v. A. W. PRATT *et al.*,
Appellants.¹

Appeal from a judgment of the superior court for King county, Morris, J., entered February 14, 1906, upon findings in favor of the plaintiff. Affirmed.

Ira Bronson and D. B. Trefethen, for appellants.

Horace A. Wilson, for respondent.

PER CURIAM.—This action was brought to recover on account of a quantity of ice sold by the plaintiff to the defendants. A trial was had before the court without a jury, and a judgment was rendered in favor of plaintiff in the sum of \$605.90, from which the defendants have appealed.

The sole controversy is in reference to what price the appellants are obligated to pay for the ice. We find the evidence very conflicting and confusing as to what was the agreement and understanding between the parties. It appears that, prior to June 2, 1905, ice was being furnished at \$2 per ton at the ice plant. Appellants contend that they had a written contract for \$3 per ton delivered, afterwards modified orally calling for its delivery at the ice plant at \$2 per ton, for a period of three years. But respondent disputes this, and the evidence is not clear that the minds of the parties ever actually met upon such agreement. In any event, however, on June 2, the respondent gave appellants written notice that, thereafter, the price would be \$3.25 per ton, and that they could get ice at the plant of the Washington Cold Storage Company, where respondent had arranged for them to get it until further notice. Appellants objected to the price, but proceeded to take the ice at the place mentioned in respondent's notice, knowing that the price fixed in the notice was \$3.25 per ton. By reason of such facts the court found as follows: "That between the 1st and 24th days of June, 1905, the plaintiff, at the special instance and request of the defendants, sold and furnished to the defendants certain quantities of ice, to wit, 15.8 tons at \$2 per ton, and 176.7 tons at \$3.25 per ton."

We think the finding is sustained by the evidence, and the judgment is affirmed.

¹Reported in 87 Pac. 936

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31. APPEAL AND ERROR—DECISION—TENDER—KEEPING GOOD—EVIDENCE—FINDINGS. In an action to redeem a pledge, in which the complaint alleged tender of the sum due the pledgee, but the findings of the court and the record on appeal fail to show whether the tender was kept good, judgment for the return of the goods will be reversed and remanded with instructions to determine whether the tender has been kept good; since if the tender was paid into court as alleged, the respondent should have made the record on appeal show such fact. *Andrews v. Uncle Joe Diamond Broker.*..... 668
32. APPEAL—DECISION—ADMISSION OF PARTIES—JUDGMENT—VACATION. The supreme court may, on remanding a case, direct that a default judgment be vacated where respondents are willing that the case be opened and tried on its merits. *Bain v. Thoms.*..... 382
33. APPEAL—DECISION—REASONS FOR REVERSAL. It cannot be objected that a judgment of reversal does not adopt all the contentions of appellant, and the supreme court may deny a request for an absolute reversal, and grant it on condition of refusal to accept a reduction of an excessive verdict. *Williams v. Spokane Falls & N. R. Co.*.. 363
34. APPEAL—REVIEW—DECISION—VERDICTS—REDUCTION. The supreme court may order a new trial, conditional upon the reduction of an excessive verdict, regardless of whether the jury were influenced by passion or prejudice. *Id.*..... 363
35. APPEAL—REVIEW—VERDICTS—REDUCTION—DECISION. Where a judgment is clearly excessive and substantial justice will be done by granting a new trial on condition that a reduction of the judgment is not accepted, the judgment should not be upheld through a technical construction of a rule of court or an unfair construction of an admission by counsel in oral argument. *Id.*..... 363
36. APPEAL AND ERROR—HEARING—DECISION—MANDAMUS. Upon application for a mandamus in the supreme court, an issue as to whether a deed of state lands has issued through fraud and collusion will be referred to the superior court for trial. *State ex rel. Shores v. Ross.*..... 246
37. APPEAL—DECISION—OBJECTIONS—WAIVER. Where a defense of usury was waived at the trial, the supreme court cannot, upon appeal by plaintiff and a reversal, permit the defendants a new trial as to such defense. *Mantle v. Dabney.*..... 193

APPEAL AND ERROR—CONTINUED.

38. **APPEAL—DECISION—LAW OF CASE.** A decision upon a former appeal that a notice of claim against a city for personal injuries is sufficiently definite, becomes the law of the case, and cannot be reviewed. *Hammock v. Tacoma*..... 623

APPEARANCE:

Right to appear after default and defend before judgment, see **JUDGMENT**, 6.

1. **APPEARANCE—SPECIAL TO OBJECT TO SERVICE—OBJECTIONS WAIVED.** Want of service of process, objected to by special appearance, is cured by a subsequent appearance to move to vacate a default judgment and for leave to answer on the merits. *French v. Ajax Oil & Development Co.*..... 305
2. **APPEARANCE—SPECIAL OR GENERAL — PROCESS — SERVICE — WAIVER** A special appearance to object to the jurisdiction for want of service of process is rendered general by asking for the dismissal of the action for reasons relating to the merits, and waives the question of due service. *Bain v. Thoms*..... 382

APPLIANCES:

Liability of employer for defects, see **MASTER AND SERVANT**, 10-12, 14.

APPLICATION:

For deed to holder of certificate of sale, conditions precedent, see **MUNICIPAL CORPORATIONS**, 21-23.
For new trial, extension of time, see **NEW TRIAL**, 3.

APPOINTMENT:

Appeal from vacation of, see **APPEAL AND ERROR**, 2.
Of receiver, see **RECEIVERS**.

APPROPRIATION:

Of water on public domain, see **PUBLIC LANDS**, 1.

ARBITRATION AND AWARD:

Construction of clause for, see **CONTRACTS**, 3.

ARCHITECTS:

Approval of work under contract, see **CONTRACTS**, 3.

ARGUMENT OF COUNSEL:

Construction of, see **APPEAL AND ERROR**, 35.
In civil actions, see **TRIAL**, 8-10.

ARMY AND NAVY:

Enlistment of minor, loss of right to services, see **PARENT AND CHILD**.

ARRAIGNMENT:

Power of court commissioner to take, see **COURT COMMISSIONERS**.

ASSAULT:

As proximate cause in action for damages, see **DAMAGES**, 3.

ASSESSMENT:

Compensation for property taken or injured for public use, see **EMINENT DOMAIN**, 1.

Of expenses of public improvements, see **DRAINS**, 1; **MUNICIPAL CORPORATIONS**, 9-15.

Of tax, see **TAXATION**, 1-3, 9.

Street improvement funds, wrongful diversion, see **MUNICIPAL CORPORATIONS**, 24, 25.

ASSIGNMENT OF ERRORS:

See **APPEAL AND ERROR**, 17.

ASSOCIATIONS:

See **BENEFICIAL ASSOCIATIONS**.

ASSUMPTION:

Of facts in charge to jury, see **TRIAL**, 3.

Of risk by employee, see **MASTER AND SERVANT**, 1, 2.

Of risk, collapse of bridge, see **NEGLIGENCE**, 1.

ATTORNEY AND CLIENT:

Affixing of administrator's signature, validity of notice, see **EXECUTORS AND ADMINISTRATORS**, 1.

Construction of argument by counsel, see **APPEAL AND ERROR**, 35.

Fraud in preventing presentment of claims, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.

Harmless error in argument of counsel, see **APPEAL AND ERROR**, 24.

Misconduct of counsel in argument to jury, see **TRIAL**, 8-10.

Payment of attorney's fees upon vacation of judgment, see **JUDGMENT**, 11.

1. **ATTORNEY AND CLIENT—COMPROMISE OF SUIT—STIPULATION—AUTHORITY OF ATTORNEY—RATIFICATION—ESTOPPEL BY ACCEPTING BENEFITS.** By accepting the benefits of a stipulation made by its attorney in compromising a suit to foreclose sewer and grade assessments, a city is estopped to question the authority of the attorney, or the validity of the judgment confessed, by reason of the fact that the settlement and judgment included the discharge of taxes and assessments not involved in the pending action. *State ex rel. Lippincott v. Spokane*..... 688

AUTHORITY:

- Condemnation of land by towns, see MUNICIPAL CORPORATIONS, 1-5, 7.
- Creation of special assessment district, see MUNICIPAL CORPORATIONS, 12, 13.
- Of broker to sign contract, see FRAUDS, STATUTE OF, 1.
- Of corporate officers or agents, see CORPORATIONS, 4.
- Of partner to execute note, evidence, see PARTNERSHIP, 1.
- Of railway commission to fix salary of expert, see STATES, 1.
- Of wife to sell community property, see VENDOR AND PURCHASER, 5.
- To audit claim of expert, see STATES, 2.

AUTOMOBILES:

- Limitation of speed on city streets, see MUNICIPAL CORPORATIONS, 26, 27.

BAILMENT:

- See PLEDGES; WAREHOUSEMEN.

BAR:

- See ESTOPPEL.
- Of action by former adjudication, see JUDGMENT, 1, 2.
- Of action by limitation, see LIMITATION OF ACTIONS.
- Of judgment, see COVENANTS.

BENEFICIAL ASSOCIATIONS:

1. BENEFICIAL ASSOCIATIONS—NONPAYMENT OF DUES—EXCUSES—UNAUTHORIZED WAIVER OF BY-LAWS. Nonpayment of dues by the beneficiaries in a fraternal benefit certificate, after insanity of the member insured, is not excused by the failure of the clerk of the local lodge to give notice of assessment, after agreeing so to do, where the by-laws provide that such nonpayment, *ipso facto*, works a suspension of the member and forfeiture of the certificate, and that the clerk shall have no power to waive or change any of the provisions of the by-laws; there having been no custom on the part of the clerk to make such waiver. *Sheridan v. Modern Woodmen of America*... 230
2. SAME—INSANITY AS EXCUSE. In such a case the insanity of the member is no excuse for failure to pay assessments when due. *Id.*..... 230
3. SAME—REFUSAL TO REINSTATE—ACQUIESCENCE AND LACHES OF BENEFICIARY OF INSANE MEMBER. The beneficiary in a mutual benefit certificate of an insane member is precluded from recovery by her own laches and acquiescence in refusal to reinstate the member, where her tender of dues was refused and returned because not accompanied by a certificate of good health, and the money was retained and no further assessments or dues paid or tendered or any steps taken to secure a reinstatement for a period of more than two years, and until after the death of the insured. *Id.*..... 230

BENEFICIARY:

Notice to of premiums due, see **INSURANCE**, 2.

BENEFITS:

Acceptance of, as waiver of right to appeal, see **APPEAL AND ERROR**, 3.

Estoppel by accepting benefits of unauthorized compromise, see **ATTORNEY AND CLIENT**, 1.

BIGAMY:

See **CRIMINAL LAW**, 18.

Invalidity of former marriage, burden of proof, see **CRIMINAL LAW**, 12.

BILLS AND NOTES:

Amount of recovery on note held as collateral, see **PLEDGES**, 2.

Authority of partner to execute note, see **PARTNERSHIP**, 1.

Deed as security for note, execution by wife, see **MORTGAGES**.

Execution in foreign state, liability of life's estate for debt of husband, see **HUSBAND AND WIFE**, 1.

BONDS:

Of municipality, payment of public indebtedness, see **MUNICIPAL CORPORATIONS**, 17, 18.

On appeal, time for filing, see **APPEAL AND ERROR**, 8, 10.

BOOKS:

Admissibility of stock books in evidence, see **EMINENT DOMAIN**, 2.

Of account, admissibility as evidence, see **PARTNERSHIP**, 2.

BOOMS:

Obstruction of navigable stream, see **NAVIGABLE WATERS**, 1-8.

BOUNDARIES:

Action to establish, right to appear and defend, see **JUDGMENT**, 6.

Cost of establishing, see **COSTS**.

New trial of action to establish lost corner, see **NEW TRIAL**, 2.

Of plat, construction, see **DEDICATION**.

Sufficiency of showing to vacate judgment, see **JUDGMENT**, 4.

1. **BOUNDARIES—ESTABLISHING LOST CORNERS—APPOINTMENT OF COMMISSIONER—REPORT—EXCEPTIONS—EVIDENCE CONTRADICTING REPORT—EXCLUSION.** In a proceeding to reestablish a lost corner by a survey, it is not error, upon receiving the report of the commissioner appointed to make the survey, to refuse to admit additional evidence as to whether the monuments were lost, and contradicting the report in that particular, where that issue had been previously determined before the appointment of the commissioner. *Strunz v. Hood*... 99

BOUNDARIES—CONTINUED.

2. **SAME—METHOD OF REESTABLISHMENT—FOLLOWING CONCEDED MONUMENTS AND FIELD NOTES.** In a proceeding to reestablish a lost corner by a survey, if the actual location of the monuments can be ascertained, it is the duty of the surveyor to relocate the lost corner by following the government field notes, proceeding from conceded monuments and corners. *Id.*..... 99

BREACH:

- Of condition, see **INSURANCE**, 6.
- Of conditional bill of sale, see **REPLEVIN**.
- Of contract, see **CONTRACTS**, 3; **VENDOR AND PURCHASER**, 1.
- Of covenant, see **COVENANTS**.

BREACH OF MARRIAGE PROMISE:

1. **BREACH OF MARRIAGE PROMISE—INCURABLE DISEASE AS DEFENSE—WHEN AGREEMENT NOT BINDING—PUBLIC POLICY.** A marriage contract is void as against public policy where one of the parties is seriously afflicted with pulmonary tuberculosis and the other has a hereditary taint of such disease, even though the parties were aware of the facts prior to the engagement. *Grover v. Zook*..... 489

BROKERS:

- Authority to execute written contract, see **FRAUDS**, **STATUTE OF**, 1.
- 1. **BROKERS—COMMISSIONS FOR SALE OF REAL ESTATE—ACTION TO RECOVER—EVIDENCE—SUFFICIENCY.** A judgment for a broker's commission in the sum of \$500 is supported where the uncontradicted evidence was to the effect that, after authorizing a sale at \$3,000, upon a commission of five per cent, the owners left it to an agent, authorizing any deal he might make, and the agent authorized a sale for \$3,500 with a commission of \$500, which the brokers made, the owners afterwards refusing to complete the deal. *Foster v. Taylor*..... 313

BUILDING CONTRACTS:

- See **CONTRACTS**, 3.

BUILDINGS:

- Delivery of materials, evidence, see **MECHANICS' LIENS**, 1.
- School buildings, selection and purchase of site, see **SCHOOLS AND SCHOOL DISTRICTS**, 1-4.

BULK STOCK LAWS:

- Sale of stock in bulk, see **FRAUDULENT CONVEYANCES**, 3.

BURDEN OF PROOF:

- To show invalidity of former marriage, see **CRIMINAL LAW**, 12.

BURGLARY:

Insurance against loss by, construction of policy, see **INSURANCE**, 4.

BURIAL:

Recovery of expenses as item of damages, see **DEATH**, 2.

BY-LAWS:

See **BENEFICIAL ASSOCIATIONS**.

CANALS:

Construction of across lands of settler, see **PUBLIC LANDS**, 1, 2.

CANCELLATION OF INSTRUMENTS:

See **QUIETING TITLE**.

Of fraudulent judgment of ouster, see **ACTION**, 1.

CANVASS OF VOTES:

Of election returns, see **MANDAMUS**, 1-4.

CARRIERS:

Damages sustained by passenger, see **DAMAGES**, 1, 2, 4.

Evidence in action for personal injuries, see **EVIDENCE**, 2, 5, 6, 7.

Evidence to support findings of negligence, see **APPEAL AND ERROR**, 30.

1. **CARRIERS—OF GOODS—RECOVERY OF GOODS—TENDER OF CHARGES.** Where a carrier charges an excessive amount and refuses to deliver the goods until such charge is paid, the owner may maintain an action for conversion without first tendering the proper charge that was due for carriage. *Gates v. Bekins*..... 422
2. **CARRIERS—NEGLIGENCE IN STARTING CAR—QUESTION FOR JURY.** The negligence of a street car conductor in starting a car before a passenger is able to take her seat is for the jury, where the passenger was a woman weighing two hundred and sixty-eight pounds, and was leading by the hand a child two years of age, and where the conductor had had his attention especially called to her condition, and started the car as she got inside the door, and before she had time to take a seat. *Plattor v. Seattle Electric Co*..... 408
3. **CARRIERS—NEGLIGENCE—DUTY TO INTOXICATED PERSON—INSTRUCTION.** In an action to recover damages from a street car company for the death of a passenger resulting from alleged negligence in permitting the deceased, while intoxicated, to alight at an unsafe place, it is error to instruct the jury to the effect that the carrier owed no greater care to an intoxicated person than to one in a normal condition, if he knew where he wanted to get off and was able to do so without assistance, and unless he was "absolutely helpless"; since the rule is that the carrier owes to a passenger a duty commensurate with his condition, and it was for the jury to determine whether due care was exercised under all the circumstances. *Sullivan v. Seattle Electric Co*..... 53

CERTIFICATE:

Certified copies of marriage certificate, admissibility, see **EVIDENCE**, 3.
Of sale as evidence of community interest, see **EXECUTION**, 2.

CERTIFICATION:

Of statement of facts, see **APPEAL AND ERROR**, 15, 16.

CERTIORARI:

Review of condemnation proceedings, see **EMINENT DOMAIN**, 4.

CESSATION OF CONTROVERSY:

See **APPEAL AND ERROR**, 3.

CHALLENGE:

Harmless error on challenge to jury, see **JURY**, 1.

CHAMBERS:

Power of judge at, see **COURT COMMISSIONERS**.

CHARGE:

To jury in civil actions, see **TRIAL**, 1-5.

To jury in criminal proceedings, see **CRIMINAL LAW**, 13-16.

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGES—RECORDING—REMOVAL TO ANOTHER COUNTY—STATUTES—REPEAL—CONSTRUCTION.** Bal. Code, § 4559, providing that mortgaged chattels removed to another county shall be discharged from the lien, as against third persons, unless within thirty days the mortgagee takes possession or records the mortgage in the new county, is not impliedly repealed by Laws 1899, p. 157, covering the subject of recording chattel mortgages, but making no provision for a second recording of removed property; since it is not repugnant to the later act, and repeals by implication are not favored. *Merritt v. Russell & Co.*..... 143

CHILD:

See **PARENT AND CHILD**.

Action for death of minor, see **DEATH**, 2., 3.

Injury to trespassers, see **ELECTRICITY**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CLAIM OF RIGHT:

To sustain adverse possession, see **ADVERSE POSSESSION**, 3.

CLAIMS:

Against estate of decedent, presentment, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.

Against state, auditing of, see **STATES**, 2.

Of creditors, discharge by accepting pro rata share, see **FRAUDULENT CONVEYANCES**, 2, 3.

CLASS LEGISLATION:

See MUNICIPAL CORPORATIONS, 27.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLATERAL ATTACK:

Upon vacation of judgment, see EXECUTION, 1.

COLLECTION:

Of taxes, see TAXATION, 2, 4.

COLLISION:

Of street cars, see MASTER AND SERVANT, 7, 14.

Of trains as negligence, see MASTER AND SERVANT, 3.

COLOR OF TITLE:

To sustain adverse possession, see ADVERSE POSSESSION, 3.

COMMENCEMENT:

Of action to foreclose tax certificates, see TAXATION, 13.

Laches in commencing action, see BENEFICIAL ASSOCIATIONS, 3.

COMMISSIONERS:

Fixing salary of expert employed by railway commission, see STATES, 1.

Power to withhold deed after execution, see PUBLIC LANDS, 3.

To establish lost boundaries, see BOUNDARIES, 2.

COMMISSIONS:

Of broker, see BROKERS.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE.

Authority of wife to sell, see VENDOR AND PURCHASER, 5.

Awarded to wife, see DIVORCE, 1, 3.

Interest in pending redemption, evidence of, see EXECUTION, 2.

COMPENSATION:

Fixing of salary of expert employed by railway commission, see STATES, 1.

For land taken for public use, see MUNICIPAL CORPORATIONS, 5.

For property taken or damaged for public use, see EMINENT DOMAIN.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 6, 7.

COMPLAINT:

In civil actions, see PLEADING; FORCIBLE ENTRY AND DETAINER.

In criminal actions, see CRIMINAL LAW, 2-5.

COMPOSITIONS WITH CREDITORS:

See FRAUDULENT CONVEYANCES, 1, 3.

COMPROMISE AND SETTLEMENT:

Estoppel by accepting benefits of, see ATTORNEY AND CLIENT, 1.

CONCLUSIVENESS:

Of judgment, see JUDGMENT, 1, 2.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONS:

In insurance policies, see INSURANCE.

Of warehouse receipt, compliance with, see WAREHOUSEMEN.

On remission of excessive verdict, see APPEAL AND ERROR, 33-35.

Precedent, in condemnation proceedings, see MUNICIPAL CORPORATIONS, 4, 5.

Precedent to issuance of deed, see MUNICIPAL CORPORATIONS, 21, 23.

CONFIRMATION:

Of sale on execution, see EXECUTION, 1.

CONSIDERATION:

For conveyance of estate, debt secured by void mortgage, see WILLS.

For waiver of damages, see DRAINS.

For warrants on general fund after exhaustion of special fund, see MUNICIPAL CORPORATIONS, 14-17.

CONSPIRACY:

Evidence of, see CRIMINAL LAW, 6-9.

CONSTITUTIONAL LAW:

Amendment of statutes, see STATUTES, 3.

Entry of judgment for failure to answer interrogatories, see JUDGMENT, 13.

Injury to riparian owner by flotation of logs, see NAVIGABLE WATERS, 3.

Uniformity, see TAXATION, 3.

CONSTRUCTION:

Of argument by counsel, see APPEAL AND ERROR, 36.

Of contract, see CONTRACTS, 1-3.

Of plat, see DEDICATION.

Of provisions of policy, see INSURANCE, 4, 6.

Of school laws, see STATUTES, 3.

Of "shall" when not mandatory, see JUDGMENT, 19.

Of statutes, see STATUTES, 1, 3, 4, 7, 9, 13.

Of subsidy agreement for construction of railroad, see SUBSCRIPTIONS.

CONTINUANCE:

See NEW TRIAL, 4.

1. CONTINUANCE—ABSENCE OF PARTY—DISCRETION OF COURT. It cannot be said that the trial court abused its discretion in refusing a continuance on the ground of the absence of one of the defendants, who for some time had been ill in another state, where the action had been pending a long time, the trial had been continued two or three times, and the plaintiff admitted that the absent defendant would testify as claimed in the affidavit for a continuance. *Traynor v. White*..... 560
2. CONTINUANCE—NEW TRIAL—ABSENCE OF WITNESS—CUMULATIVE TESTIMONY. It is not an abuse of discretion to refuse a motion for a continuance or grant a new trial, where it does not appear that the evidence sought from an absent witness was not cumulative, and opportunity was given to take his deposition. *Creech v. Aberdeen*..... 72

CONTRACTORS:

Delivery of material, evidence, see MECHANICS' LIENS, 1.

CONTRACTS:

See CARRIERS, 1; CORPORATIONS, 4; COVENANTS; MINES AND MINERALS; SUBSCRIPTIONS; WAREHOUSEMEN.

Agreement to purchase land, right to forfeiture, see TENANCY IN COMMON.

Agreement to waive damages, consideration, see DRAINS.

Authority of partner to execute note, see PARTNERSHIP, 1.

Breach of conditional bill of sale, see REFLEVIN.

Evidence to establish contract of employment, see CORPORATIONS, 4.

Improvement of streets, see MUNICIPAL CORPORATIONS, 8, 13, 14.

Mutuality of pledge agreement, see PLEDGES, 1.

Mutuality, specific performance, see VENDOR AND PURCHASER, 4.

Of employment, authority to fix salary, see STATES, 1.

Of employment, variance, see PLEADING, 1.

Sales of realty, see VENDOR AND PURCHASER.

Specific performance, see SPECIFIC PERFORMANCE.

To convey land, see FRAUDS, STATUTE OF, 1.

Void as against public policy, see BREACH OF MARRIAGE PROMISE, 1.

1. CONTRACTS—CONSTRUCTION—PRINCIPAL AND AGENT—DURATION OF AGREEMENT—QUESTION FOR JURY. In an action by an agent for commissions for sales made in January, 1902, under a contract "for season of 1901," wherein the principal agreed to furnish machines for all sales made "prior to November 1st, 1901," the duration of the contract, or whether it was extended, was properly submitted to the jury, where there was evidence of letters, acceptance of sales, and appropriation by defendant of the proceeds, justifying a finding that the contract was extended; as employment after expiration of the term is presumed to continue at the original rate and not upon a quantum meruit. *Schurra v. Buffalo-Pitts Co.*..... 693

CONTRACTS—CONTINUED.

2. **CONTRACTS—CONSTRUCTION—AGREEMENT FOR PAYMENT OF MONEY OR MORTGAGE.** A contract to purchase fruit trees reciting that the purchaser is the owner of certain lands and that he "binds himself, his heirs, assigns and grantees" of said lands, cannot be treated as a mortgage of the premises, but is a simple contract for the payment of money. *Stark Brothers v. Royce*..... 287
3. **CONTRACTS—BREACH OF UNIFORM CONTRACT—ARBITRATION.** Under the terms of a "uniform" building contract providing for arbitration only of the cost of alterations, reviewing the architect's certificate extending time, and damages by reason of delay, damages for money expended in paying unpaid bills of the contractor and for completing work which he left unfinished are not subject to arbitration. *Main Investment Co. v. Olsen*..... 121

CONTRIBUTION:

Promises to contribute, see **SUBSCRIPTIONS**.

CONTRIBUTORY NEGLIGENCE:

Harmless error as to opinions, see **APPEAL AND ERROR**, 27.
 Of person injured at railroad crossing, see **RAILROADS**, 1.
 Of servant, see **MASTER AND SERVANT**, 3-7.
 Of teamster in driving onto bridge, see **NEGLIGENCE**, 1.
 Opinion evidence, see **EVIDENCE**, 1.

CONVERSATIONS:

As evidence of intent to contribute to support, see **DEATH**, 1.
 Evidence of, admissibility, see **CRIMINAL LAW**, 6, 7.

CONVERSION:

Action for conversion of goods, see **CARRIERS**, 1.
 Wrongful conversion of personal property, see **TROVER AND CONVERSION**.

CONVEYANCES:

See **DEEDS; MORTGAGES**.
 By executors, payment of debt secured by void mortgage, see **WILLS**, 2.
 Contracts to convey, see **VENDOR AND PURCHASER**.
 In fraud of creditors, see **FRAUDULENT CONVEYANCES**.
 Sale of assets to new corporation, see **CORPORATIONS**, 1-3. .

CORPORATIONS:

See **BENEFICIAL ASSOCIATIONS; MUNICIPAL CORPORATIONS**.
 Boom companies, obstruction of stream, see **NAVIGABLE WATERS**, 1-3.
 Completion of contract by corporation as act of individual, see **SUBSCRIPTIONS**, 3.
 Condemnation by railway, evidence of compliance with statute, see **EMINENT DOMAIN**, 2.

CORPORATIONS—CONTINUED.

Entry of judgment for failure to answer interrogatories, see JUDGMENT, 13-15.

Injury to trespassers, see ELECTRICITY.

Location of right of way, adoption of extra-territorial acts, see RAILROADS, 2.

1. CORPORATIONS—SALE OF ASSETS TO NEW CORPORATION—RIGHTS OF CREDITORS. Where a corporation is organized to take over the business and all the assets of another corporation, which it purchases, paying over the consideration directly to and for the benefit of the trustees, knowing that the selling corporation is unable to pay its creditors, the new corporation is liable for the debts of the other, although it is not alleged that it assumed to pay the same; since the assets were a trust fund for creditors, as to whom the transaction was fraudulent. *Carstens & Earles v. Hofus*..... 456
2. SAME. The fact that the new corporation assumed the indebtedness of the other, does not relieve the trustee from liability to a creditor who had no notice of the transaction. *Id.*..... 456
3. CORPORATIONS—CONVEYANCES—SELLING OUT TO ANOTHER CORPORATION—CREDITORS—LIABILITY OF TRUSTEE OF SELLING CORPORATION. Where a corporation sells all of its assets to a corporation newly organized by part of the trustees, which assumed the old indebtedness, the balance of the consideration passing directly to the trustees and for their benefit, a trustee who participated therein and received benefits from the transaction is liable to the creditors of the corporation, under Bal. Code, § 4265. *Id.*..... 456
4. CORPORATIONS—CONTRACTS—AUTHORITY OF OFFICER—RATIFICATION. The evidence is sufficient to establish that a contract of employment as engineer for a new townsite, made by the president of a corporation, was authorized or ratified by the corporation, where it appears that the contract was made with the knowledge of a majority of the trustees, that the company took options, purchased supplies, and dealt with the operations in its own name, with the president in charge in the name of the company, which received the benefits of the contract; since such employment was within the scope of the general management and apparent or implied authority of the president. *Rowland v. Carroll Loan & Inv. Co.*..... 413
5. CORPORATIONS—STOCKHOLDERS—ASSIGNMENT OF STOCK—BREACH OF AGREEMENT TO PAY FOR STOCK—RIGHT OF TRUSTEES TO CANCEL STOCK CERTIFICATE. Where stock in a corporation is assigned to the owner, and a certificate duly issued to another, who thereupon becomes the owner thereof, the trustees have no power to forfeit and cancel the stock for the failure of the vendor stockholder to pay the company for the stock, or for failure of the vendee to perform any contract he may have had with his vendor. *Falk v. Schmitz Alaska Dredging & Min. Co.*..... 612

CORROBORATION:

On prosecution for rape, see **CRIMINAL LAW**, 10.

COSTS:

Award of in civil actions, see **MANDAMUS**, 4.

1. **COSTS—BOUNDARIES—ACTION TO ESTABLISH.** In an action to re-establish a lost corner it is error to tax the costs to the successful party, but the same should be equitably apportioned by an equal division between the parties. *Strunz v. Hood*..... 99

CO-TENANCY:

See **TENANCY IN COMMON**.

COUNTERCLAIM:

Reducing amount in controversy, see **APPEAL AND ERROR**, 1.

COUNTIES:

Execution of tax deed, absence of seal, see **TAXATION**, 7, 8.

COURSES AND DISTANCES:

See **BOUNDARIES**.

COURTS:

Appointment of receivers, jurisdiction, see **RECEIVERS**.

Jurisdiction to compel sublease, see **SPECIFIC PERFORMANCE**, 1.

Mandamus to compel trial, see **MANDAMUS**, 6.

Removal of action from state court to United States court, see **REMOVAL OF CAUSES**.

Review of decisions, see **APPEAL AND ERROR**.

1. **COURTS—POWER TO CORRECT FORMER RULING.** It is not beyond the power of a trial court to reverse its ruling denying a motion for a nonsuit, where immediately after the oral announcement extensive arguments followed, and no judgment or formal order was made, the motion having at first been considered as merely formal. *Brown v. Northern Pac. R. Co.*..... 1
2. **COURTS — APPELLATE JURISDICTION — SUPERSEDEAS — INJUNCTION PENDING AN APPEAL.** The supreme court has no original jurisdiction to grant injunctive relief pending an appeal upon the application of an appellant, who alleges the commission of acts by the respondent entitling him to relief independent of the appeal, and which are not in violation of appellant's supersedeas bond. *Van Siclen v. Muir* 361

COVENANTS:

1. **COVENANTS—BREACH OF WARRANTY—JUDGMENTS—CONCLUSIVENESS—NOTICE TO DEFEND.** Where a covenantor in a warranty deed was served with notice to appear and defend an action of ejectment, and failed to do so, a default judgment entered in the ejectment suit is not conclusive against the covenantor that his title was defective,

COVENANTS—CONTINUED.

unless the covenantee proves, or the record in ejectment affirmatively shows, that his title was in issue; and an action on the covenant is properly dismissed where the plaintiff failed to show that the judgment in ejectment was not rendered by reason of any act or default on his part. *Peterson v. Steinhoff*..... 189

CREDIBILITY:

Of witnesses, see CRIMINAL LAW, 10.

CREDITORS:

Preference by failing debtor, see FRAUDULENT CONVEYANCES, 2.

Rights of on sale of assets, see CORPORATIONS, 1-3.

Sufficiency of notice of administration, see EXECUTORS AND ADMINISTRATORS, 1, 4.

CREDITOR'S SUIT:

Complaint in cases of fraudulent conveyances, see FRAUDULENT CONVEYANCES, 1.

CRIMINAL LAW:

I. INFORMATION AND DEFINITIONS.

Instructions as to lesser offense, see CRIMINAL LAW, 13.

1. ROBBERY—FORCE AND PUTTING IN FEAR—IMPERSONATING OFFICERS. There is sufficient element of force and putting in fear to constitute the crime of robbery, where the prosecuting witness, while drunk, was forcibly conducted to a saloon under the pretext that he was under arrest and must be searched, and that the defendants were officers, who were about to lock him up, and who thereupon forcibly took his money when no one else was present, under commands to keep silent. *State v. Parsons*..... 299
2. CRIMINAL LAW—MALICIOUS TRESPASS—INFORMATION—STATUTES—CONSTRUCTION. In a prosecution for the statutory offense of "willfully or maliciously" making an aperture in a dam for agricultural purposes, it is not necessary to charge that the act was maliciously done; since "or" cannot be construed to mean "and" in this connection. *State v. Tiffany*..... 602
3. SAME. An information in a prosecution for making an aperture in a dam used for agricultural purposes is sufficient where it charges that the dam was used for irrigation purposes, as the terms are synonymous. *Id.*..... 602
4. SAME. A dam constructed to conduct water for irrigation purposes comes within the statute against malicious trespass to any structure to conduct water for agricultural purposes. *Id.*..... 602
5. INDICTMENT AND INFORMATION—FURNISHING COPY. Error cannot be predicated upon failure to furnish the defendants with a copy of the information, after plea thereto and announcement that they were ready for trial, without any demand therefor or objection to the trial. *State v. Dilley*..... 207

CRIMINAL LAW—CONTINUED.

II. EVIDENCE.

6. CRIMINAL LAW—ROBBERY—EVIDENCE OF CONSPIRACY. Upon a joint prosecution for robbery under claim that a conspiracy existed between defendant D. and the other defendants, conversations between D. and the prosecuting witness, had while the other defendants were not present, are properly admitted in evidence against D., and against the others if further evidence should show concerted action between them. *Id.*..... 207
7. SAME—EVIDENCE OF CONCERTED ACTION—SUFFICIENCY. There is sufficient evidence of concerted action on the part of defendants, jointly prosecuted for robbery, to admit evidence of conversations had with one of the defendants while the others were not present, where it appears that by such conversations the prosecuting witness was lured to the home of the defendants where he was attacked and robbed by all of the defendants actively participating therein. *Id.*..... 207
8. SAME—LETTERS—ADMISSIBILITY. In such a case, a letter written by one of the conspirators suggesting the line of evidence to be used by the two other defendants on the defense of the writer, which letter fell from her room, is sufficiently identified from its contents without proof of the handwriting or signature, and it is admissible against the other defendants in case attempted correspondence was going on between them at the time, and the other defendants were concerned in the offense, although the letter alone was not sufficient evidence of the conspiracy. *Id.*..... 207
9. SAME—EVIDENCE OF CONSPIRACY. In such a case there is sufficient *prima facie* evidence of a conspiracy to necessitate the submission of the question to the jury. *Id.*..... 207
10. RAPE—CONDUCT OF PROSECUTRIX—EVIDENCE—ADMISSIBILITY. In a prosecution for rape where the prosecutrix is uncorroborated except by her evident condition of pregnancy, it is prejudicial error to exclude evidence offered by the defendant tending to show that, at the time of the alleged acts and while she was a member of his household, the prosecutrix was habitually away at night from twelve to four o'clock, as tending to account for her condition and reflecting upon her credibility. *State v. Mobley*..... 549
11. RAPE—EVIDENCE OF OTHER ACTS. In a prosecution for rape, evidence of other acts between the parties is admissible. *Id.*..... 549
12. BIGAMY—DEFENSES—INVALIDITY OF FORMER MARRIAGE—BURDEN OF PROOF. In a prosecution for bigamy, the burden of proof is upon the defendant to show that the former marriage, proven by the state, was invalid by reason of the incompetence of the wife to enter into the relation. *State v. Kniffen*..... 485

CRIMINAL LAW—CONTINUED.

III. TRIAL—INSTRUCTIONS.

Power of court commissioner to take arraignment, see COURT COMMISSIONERS.

13. CRIMINAL LAW—TRIAL—INSTRUCTIONS AS TO LESSER DEGREES—REQUESTS. Error cannot be predicated upon the failure of the court to instruct the jury as to lesser offenses included in the charge, in the absence of specific requests therefor. *State v. Parsons*..... 299
14. SAME—INSTRUCTIONS AS TO DEGREE OF FORCE. Upon a prosecution for robbery it is proper to instruct that the degree of force is immaterial if it was sufficient to compel the prosecuting witness to part with his money. *Id.*..... 299
15. RAPE—CORROBORATION—INSTRUCTIONS. In a prosecution for rape it is proper to refuse an instruction cautioning the jury against convicting upon the uncorroborated evidence of the prosecutrix. *State v. Mobley*..... 549
16. TRIAL—INSTRUCTIONS—COMMENT ON THE EVIDENCE. An instruction assuming as a fact that defendant had fled is not an unlawful comment on the evidence, where the defendant admitted and himself testified to the fact. *State v. Belknap*..... 605
17. CRIMINAL LAW—TRIAL—SEDUCTION—IMPROPER CROSS-EXAMINATION. In a prosecution for seduction, in which three witnesses for the defendant testified that they previously had had sexual intercourse with the prosecutrix, it is an abuse of discretion and prejudicial error, depriving the defendant of a fair trial, to permit cross-examination to proceed to the extent of asking whether one of such witnesses had broken an engagement with another woman, whether one of them had been accused of bastardy, and allowing questions implying that they had had sexual intercourse with other women. *Id.*..... 605
18. BIGAMY—WITNESSES—COMPETENCY OF FIRST WIFE. Bigamy is not an offense committed by one spouse against another; hence the first wife is not a competent witness in a prosecution against the husband, under Bal. Code, § 5994 disqualifying a wife except in prosecutions for a crime committed by one spouse against another. *State v. Kniffen*..... 485
19. RAPE—SENTENCE—EXCESSIVE PUNISHMENT. *Semble*, that a life sentence upon a defendant thirty-two years of age for rape upon a female fifteen years of age, she appearing to have consented, is excessive punishment. *State v. Mobley*..... 549

CROSS-EXAMINATION:

See CRIMINAL LAW, 17.

CRUELTY:

Ground for divorce, see DIVORCE, 2.

DAMAGES:

See TROVER AND CONVERSION.

Amount in controversy, see REMOVAL OF CAUSES.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN.

Consideration for waiver of, see DRAINS.

For delay, see CONTRACTS, 3.

For loss of goods stored, see WAREHOUSEMEN.

In action for death of minor, see DEATH, 2, 3.

To riparian owner by obstruction of stream, see NAVIGABLE WATERS, 2, 3, 5, 6.

1. DAMAGES—PROSPECTIVE EARNING CAPACITY—EVIDENCE—PROOF REQUIRED—INSTRUCTIONS. It is error to instruct that it is incumbent upon the plaintiff, in a personal injury case, in order to recover for prospective damages for impairment of earning capacity, that the same must be established by clear and convincing proof, since a preponderance of the evidence is all that is required. *Rowe v. Whatcom County R. & Light Co.*..... 658
2. DAMAGES — AGGRAVATION — REASONABLE CARE OF PLAINTIFF — INSTRUCTIONS. In an action for personal injuries an instruction is not erroneous as making the plaintiff responsible for the results of his physician's treatment, where it merely holds him to the exercise of reasonable care in securing treatment and seeking a cure. *Id.*.. 658
3. DAMAGES—ASSAULT CAUSING MISCARRIAGE—PROXIMATE CAUSE OF INJURY—EVIDENCE—WEIGHT AND SUFFICIENCY. In an action for damages by reason of a miscarriage alleged to have been the result of an assault, a nonsuit is properly granted where the time that intervened—thirty-three days—was, according to the expert testimony, greatly in excess of the ordinary time, and the cause of the miscarriage could not be determined without entering the realms of speculation and conjecture. *Stone v. Crewdson*..... 691
4. DAMAGES—EVIDENCE—FEES OF EXPERTS. Where a physician is appointed by the court to make a physical examination in a personal injury case, at the instance of the defendant, evidence as to the fees paid therefor is properly excluded as irrelevant and immaterial. *Rowe v. Whatcom County R. & Light Co.*..... 658
5. DAMAGES—EXCESSIVE VERDICT—APPEAL—REVIEW—REDUCTION. A verdict for \$2,500, reduced by the trial court to \$1,500, is still excessive and will be further reduced by the supreme court to the sum of \$1,000, where the plaintiff was not permanently injured, was in the hospital but two weeks, suffered for a short time thereafter, and within a short time was at work earning an advance of \$2 per day over his previous employment. *Comrade v. Atlas Lumber & Shingle Co.*..... 470

DAMAGES—CONTINUED.

6. **DAMAGES—EXCESSIVE VERDICT—EJECTION OF PASSENGER FROM TRAIN.** A verdict for \$1,000 damages for the ejection of a woman from a train, due to the mistake of a ticket exchanger, is excessive and should be reduced to \$500, where it appears that the same resulted in a delay of but twenty-four hours, accompanied only by such anxiety and annoyance as would ordinarily excite the mind of a woman under such circumstances, and only a temporary illness by reason of such excitement. *Shannon v. Northern Pac. R. Co.* . . . 321

DAMS:

Injury to irrigation dam, see **CRIMINAL LAW**, 2-4.

DANGER:

Duty to provide safe place, see **NEGLIGENCE**, 1.

Master's duty to warn servant, see **MASTER AND SERVANT**, 2, 8, 12.

DANGEROUS PREMISES:

Railway tracks in street, duty to look and listen, see **RAILROADS**, 1.

DEATH:

Delivery of deed after death of grantor, see **DEEDS**.

Of railroad engineer, see **MASTER AND SERVANT**, 3.

Wrongful death caused by operation of railroad, see **RAILROADS**, 1.

1. **DEATH—BY WRONGFUL ACT—PARENT AND CHILD—EMANCIPATION—CONTRIBUTION TO SUPPORT—INTENT—EVIDENCE—ADMISSIBILITY.** In an action by parents for the death of their minor son who had run away from home, in which the defense is that he was emancipated and contributed nothing to the plaintiff's support, conversations and letters expressing an intent on the part of the decedent to contribute to such support are not incompetent as self-serving declarations. *Dean v. Oregon R. & Nav. Co.* 564
2. **SAME—DAMAGES—RECOVERY FOR BURIAL EXPENSES.** In an action by parents to recover for the death of their minor son, the sum of \$178 for burial expenses and transporting the body to the old home is a proper item for recovery. *Id.* 564
3. **SAME—DAMAGES—EARNING ABILITY—EVIDENCE.** In an action by parents for the death of their minor son, who had run away from home, a recovery of about \$1,000 is justified without any evidence as to his earning ability at his parent's home or that he contributed to their support, where there was evidence as to his wages at the time of his death justifying the verdict. *Id.* 564

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

Debt created under invalid incorporation, see **MUNICIPAL CORPORATIONS**, 14-17.

Liability of wife's estate for debt of husband, see **HUSBAND AND WIFE**, 1.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

DECREE:

Division of property, see DIVORCE, 1, 3.

DEDICATION:

1. DEDICATION — BOUNDARIES OF PLAT BORDERING ON RIVER — CONSTRUCTION. Where the banks of a river had been washed away after the meander line was established, and subsequently a plat of an addition bordering on the river showed the length of the fractional lots as running to the edge of the grass line on the river bank, and in the survey, stakes marked the southern boundary of the plat at such point, the side lines of the lots not being joined on the plat nor extended to the meander line, the plat making no reference to the river, the plat does not extend to the meander line, and streets dedicated do not extend beyond the abutting lots as shown by the stakes and official plat. *Polson v. Aberdeen*..... 155

DEEDS:

- As security for note, execution by wife, see MORTGAGES.
Cancellation of sheriff's deed, see QUIETING TITLE.
Covenants in deeds, see COVENANTS.
Estoppel by deed, see ESTOPPEL.
Issuance to holder of certificate of sale, see MUNICIPAL CORPORATIONS, 21-23.
Of public lands, power of commissioner to withhold deed after execution, see PUBLIC LANDS, 3.
Quitclaim by assignee of sheriff's certificate, after judgment of foreclosure, see LIS PENDENS.
Reformation, see REFORMATION OF INSTRUMENTS.
Reformation of absolute deed as mortgage, joinder, see ACTION, 1.
Tax deeds, see TAXATION, 5, 7, 8.
Trial of issue of fraud in securing state deed, see APPEAL AND ERROR, 37.
1. DEEDS—DELIVERY. A deed not delivered until after the death of the grantor conveys no title. *Meikle v. Cloquet*..... 513

DEFAULT:

- By joint purchaser, right to forfeiture, see TENANCY IN COMMON.
By vendee, recovery of money paid, see VENDOR AND PURCHASER, 4.
Judgment by, see JUDGMENT, 12-15, 19.
Judgment, for failure to answer interrogatories, and record on appeal, see APPEAL AND ERROR, 13.
Vacation, see JUDGMENT, 3-5, 10.
Vacation of, on decision on appeal, see APPEAL AND ERROR, 32.

DEFECT:

- In machinery, see MASTER AND SERVANT, 10-12, 14.
- In street or sidewalk, see MUNICIPAL CORPORATIONS, 28, 29.

DELAY:

- In performance, see CONTRACTS, 3.
- Of vendor, rescission of contract, see VENDOR AND PURCHASER, 2.

DELIVERY:

- Of building material, see MECHANICS' LIENS, 1-3.
- Of deed, see DEEDS.
- Of deed to state lands, power to withhold, see PUBLIC LANDS, 3.

DEMAND:

- For deed to holder of certificate of sale, conditions precedent, see MUNICIPAL CORPORATIONS, 21-23.
- For inspection of documents, defense, see DISCOVERY.

DEMURRER:

- Harmless error in overruling, see APPEAL AND ERROR, 25.
- In pleadings, see PLEADING, 2.

DENIALS:

- In pleadings, see PLEADING, 2.

DEPOSITS IN COURT:

1. DEPOSIT IN COURT—FRAUD—EQUITY. In an action by a vendor to recover purchase money, obtained by fraud in the sale of lands, the amount tendered and deposited in court by an intervener, claiming as successor in interest of the defendant, and which was not accepted, cannot be awarded to the plaintiff, upon judgment against the defendant, but belongs to the intervener. *Lazier v. Cady* 339

DESCRIPTION:

- Of property in tax deed, see TAXATION, 5.

DIRECTORS:

- Adoption of extra-territorial acts, see RAILROADS, 2.
- Of corporations, see CORPORATIONS, 1-3.

DISCHARGE:

- Of claims by creditors of insolvent, see FRAUDULENT CONVEYANCES, 2, 3.

DISCOVERY:

- Entry of judgment for failure to answer interrogatories, see JUDGMENT, 13-15.
- Judgment on default for failure to answer interrogatories, and record on appeal, see APPEAL AND ERROR, 13.

DISCOVERY—CONTINUED.

1. **DISCOVERY—INSPECTION OF PAPERS—MATERIALITY.** A party upon whom a demand is made for the inspection of papers or documents as provided by Bal. Code, § 6047, has the right to defeat the demand by showing that such documents or papers sought are not material to the support or defense of the action. *Lawson v. Black Diamond Coal Min. Co.*..... 26

DISCRETION OF COURT:

- Allowance of amendment, see **REMOVAL OF CAUSES.**
- As to continuance, see **CONTINUANCE**, 1, 2.
- Imposition of terms upon vacation of judgment, see **JUDGMENT**, 11.
- Mandamus to compel trial, see **MANDAMUS**, 6.
- See **NEW TRIAL**, 1, 4.

DISEASES:

- As defense to promise of marriage, see **BREACH OF MARRIAGE PROMISE**, 1.

DISMISSAL AND NONSUIT:

- Dismissal of appeal, see **APPEAL AND ERROR**, 8-10, 19.
- Nonsuit in action for personal injuries, see **MASTER AND SERVANT**, 5.

DISTRICTS:

- Creation of special assessment district, see **MUNICIPAL CORPORATIONS**, 12, 13.

DITCHES:

- See **DRAINS**.

DIVERSION:

- Wrongful diversion of local improvement funds, see **MUNICIPAL CORPORATIONS**, 24, 25.

DIVORCE:

1. **DIVORCE—DIVISION OF PROPERTY—PROPRIETY.** Where, upon appeal in an action for divorce, the supreme court remanded the case with directions to take further evidence as to the value of the property, and either make division thereof or award the wife a money judgment for her share, it is error to decree the division of a tract of land, the value of which was dependent upon an irrigating ditch carrying an insufficient supply of water, which it would be impractical to use jointly for separate portions of the tract, as such division would be detrimental to the interests of both parties; and a proper money judgment should be awarded to the wife in lieu of a share in such real estate. *Richardson v. Richardson*..... 431

DIVORCE—CONTINUED.

2. **DIVORCE — CRUELTY — RENDERING LIFE BURDENSOME — FINDINGS — EVIDENCE.** That the parties lived in a constant state of turmoil, and that the husband repeatedly, in the presence of strangers, accused the wife of infidelity without any justification, warrants a divorce on the ground of cruelty and personal indignities rendering life burdensome. *Markowski v. Markowski*..... 594
3. **SAME — DIVISION OF PROPERTY — COMMUNITY PROPERTY — ALL AWARDED TO WIFE.** Upon granting a divorce to the wife, the court may award all the community property, of the value of \$1,150, to the wife, where such provision is necessary for her support. *Id.* 594

DOCUMENTS:

Copy of record of marriage certificate as evidence, see **EVIDENCE**, 3.
 Production and inspection of writings, see **DISCOVERY**.

DRAINS:

1. **DRAINS—ASSESSMENTS FOR BENEFITS—WAIVER OF DAMAGES—CONTRACT—CONSIDERATION—EVIDENCE—ADMISSIBILITY.** Evidence is not admissible of want of consideration for a waiver of damages, signed by property owners upon the organization of a drainage district, which waiver recited as a consideration the desirability of forming the district and that the waiver was necessary therefor, where the evidence offered was that the waiver was induced by fraudulent representations of one R., who was interested in the matter and afterwards one of the commissioners of the district, to the effect that the owners would not be taxed if not benefited, and that R. agreed with them that they would not be benefited; since (1) R. did not agree that they should not be taxed if benefited; (2) the representations were not the consideration recited in the waiver, or the sole consideration; and (3) R. had no authority to agree that they should not be taxed for benefits. *Drainage District v. Armstrong*..... 23
2. **SAME—CONSIDERATION.** In such case, a waiver of damages reciting that it was of importance to the signers that the district be organized and that other owners refused to join in the petition unless the waiver was signed, states two sufficient considerations for the waiver. *Id.*..... 23

DUE PROCESS OF LAW:

See **TAXATION**, 4.
 Entry of judgment for failure to answer interrogatories, see **JUDGMENT**, 13.

DUTY:

See **CARRIERS; MASTER AND SERVANT**.
 Of pedestrian to look and listen, see **RAILROADS**, 1.

EARNING CAPACITY:

Damages for impairment of, see **DAMAGES**, 1.

EJECTMENT:

See **FORCIBLE ENTRY AND DETAINER**, 4.

Judgment as bar to action on covenants, see **COVENANTS**.

1. **EJECTMENT—PLAINTIFF'S TITLE—TITLE IN THIRD PERSON.** In ejectment it is of no avail for plaintiffs, on failure to prove title in themselves, to claim that defendant's title by foreclosure is defective for failure to join a necessary party, a third person, who accordingly held the title. *Wright v. Jessup*..... 618

ELECTION OF REMEDIES:

See **FORCIBLE ENTRY AND DETAINER**, 2.

ELECTIONS:

Mandamus to compel canvass of election returns, see **MANDAMUS**, 14.

School election, purchase and selection of building site, see **SCHOOLS AND SCHOOL DISTRICTS**.

ELECTRICITY:

1. **ELECTRICITY—NEGLIGENCE—INJURY TO TRESPASSERS.** An electric company is not liable to a boy who was injured while climbing after bird's nests, up the steel lattice work of a high pier supporting a public bridge, by reason of coming in contact with one of the company's live electric wires, which was thirty feet from the ground, properly insulated and eighteen inches from the pier, where the company had no notice that children were in the habit of climbing up such piers; since the place was not one where the public might rightfully go for business or pleasure, nor one that was rendered attractive to children by any act or structure of the company, and since the company could not have reasonably anticipated the presence of children at such place. *Graves v. Washington Water Power Co.*..... 675

EMANCIPATION:

Enlistment of minor in army, loss of right to services, see **PARENT AND CHILD**.

EMINENT DOMAIN:

See **NAVIGABLE WATERS**.

Condemnation by towns, amendment of statutes, see **STATUTES**, 2.

Condemnation of settler's rights, see **PUBLIC LANDS**, 1.

Institution of condemnation proceedings as affecting vendor's title, see **VENDOR AND PURCHASER**, 1.

Location of right of way, adoption of extra-territorial acts, see **RAILROADS**, 2.

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 1-7.

EMINENT DOMAIN—CONTINUED.

1. **EMINENT DOMAIN — DAMAGES — ASSESSMENT — ENTIRE TRACTS.**
Where, in a condemnation proceeding, the defendants expressly raise the point that the tract across which condemnation is sought is only part of an entire farm used as one tract, they are entitled to have the entire tract considered as a basis for estimating their damages. *State ex rel. Biddle v. Superior Court*..... 108
2. **EMINENT DOMAIN—CORPORATIONS—STATUTORY REQUISITE OF SUBSCRIPTIONS TO STOCK—EVIDENCE—STOCK BOOKS.** The properly identified stock books of a railway corporation, showing the names of the subscribers of all the capital stock, is presumptive evidence that all the stock was subscribed, as required by Bal. Code, § 4250, to entitle the railway to condemn land for right of way. *Id.*..... 108
3. **SAME—SUBSCRIPTION BY TRUSTEE.** A subscription to the capital stock of a corporation by one subscribing as trustee, shows a liability to pay therefor and is a sufficient subscription, in the absence of want of good faith or insolvency, to entitle a railway to condemn land for a right of way. *Id.*..... 108
4. **EMINENT DOMAIN—JUDGMENT—REVIEW—CERTIORARI OR APPEAL.** Certiorari does not lie to review a judgment entered on the jury's award of damages whereby the petitioner was required to forthwith elect, pending appeal from the judgment, whether it would pay the award and take the property; inasmuch as all questions arising at or after the trial before the jury may be reviewed on appeal from the judgment. *State ex rel. Port Townsend Southern R. Co. v. Superior Court*..... 554

EMPLOYEES:

See MASTER AND SERVANT; NEGLIGENCE.
Of state, see STATES.

EMPLOYMENT:

See CONTRACTS.
Scope of, evidence, see MASTER AND SERVANT, 1, 13.

ENFORCEMENT:

Amount of recovery on note held as collateral, see PLEDGES, 2.

ENTRY:

Of judgment against one partner for partnership debt, see PARTNERSHIP, 3.
Of judgment for failure to answer interrogatories, see JUDGMENT, 13-15.
Of judgment, when not mandatory, see JUDGMENT, 19.

EQUITY:

See SPECIFIC PERFORMANCE.
Award of tender, see DEPOSIT IN COURT.
Necessity of findings in equitable action, see TRIAL, 6.

ESCROWS:

Estoppel to dispute delivery after termination of option, see **BILLS AND NOTES**, 1.

ESTABLISHMENT:

Cost of establishing boundaries, see **COSTS**.
Of disputed boundary, see **BOUNDARIES**, 1, 2.
Of drains, see **DRAINS**.

ESTATES:

Decedents' estates, see **EXECUTORS AND ADMINISTRATORS**.
Tenancy in common, see **TENANCY IN COMMON**.

ESTOPPEL:

- By accepting benefits of unauthorized compromise, see **ATTORNEY AND CLIENT**, 1.
- By judgment, see **JUDGMENT**, 1.
- Of owner to object to tax, see **TAXATION**, 5.
- Of party to ask review of evidence, see **APPEAL AND ERROR**, 29.
- To claim fraud on termination of option, see **BILLS AND NOTES**, 1.
- To enjoin use of canal, after issuance of patent, see **PUBLIC LANDS**, 2.
- 1. **ESTOPPEL—ACCEPTANCE OF DEED.** The acceptance of a deed from plaintiff to defendant of part of the premises to which plaintiff seeks to quiet title, does not operate to estop the defendant from claiming the balance of the land in dispute. *Carroll v. Hill Tract Improvement Co.*..... 569

EVIDENCE:

- See **ADVERSE POSSESSION**, 1, 2; **BOUNDARIES**, 1; **BROKERS**, 1; **CARRIERS**, 2; **SPECIFIC PERFORMANCE**, 1.
- As to construction of contracts, see **CONTRACTS**, 1.
- Books of account as evidence, see **PARTNERSHIP**, 2.
- Conduct of prosecutrix, admissibility, see **CRIMINAL LAW**, 10.
- Contributory negligence of passenger, see **CARRIERS**, 3.
- Corroboration in criminal prosecutions, see **CRIMINAL LAW**, 10-15.
- Deed as *prima facie* evidence, admissibility, see **TAXATION**, 7.
- For personal injuries, see **RAILROADS**, 1.
- For personal injuries through defective street or sidewalk, see **MUNICIPAL CORPORATIONS**, 29.
- Impairment of earning capacity, proof required, see **DAMAGES**, 1.
- Invalidity of former marriage, burden of proof, see **CRIMINAL LAW**, 12.
- Letters, admissibility in prosecution for robbery, see **CRIMINAL LAW**, 8.
- Newly discovered, as ground for new trial in civil actions, see **NEW TRIAL**, 1, 2.
- Of amount to be charged to property, see **MECHANICS' LIENS**, 2.

EVIDENCE—CONTINUED.

- Of community interest pending redemption from foreclosure sale, see EXECUTION, 2.
 - Of conspiracy to commit robbery, admissibility, see CRIMINAL LAW, 6-9, 14.
 - Of delivery of materials, see MECHANICS' LIENS, 1.
 - Of facts otherwise established, see APPEAL AND ERROR, 27, 28.
 - Of fees of experts, see DAMAGES, 4.
 - Of minor's intent to contribute to parent's support, see DEATH, 1.
 - Of misappropriation of special fund, see MUNICIPAL CORPORATIONS, 25.
 - Of other acts in prosecution for rape, see CRIMINAL LAW, 18, 20.
 - Of performance of contract, see MINES AND MINERALS.
 - Of personal injuries, see MASTER AND SERVANT, 3, 5, 6, 9, 13, 14.
 - Of proximate cause of injury, see DAMAGES, 3.
 - Of rape, conduct of prosecutrix, see CRIMINAL LAW, 10.
 - Of subscription to stock of corporation, see EMINENT DOMAIN, 2.
 - Of want of authority of partner to execute note, see PARTNERSHIP, 1.
 - Of want of consideration for waiver of damages, see DRAINS, 1.
 - Pleadings and proof, variance, etc., see PLEADING, 1.
 - Production of documentary evidence, see JUDGMENT, 15.
 - Proof as constituting *prima facie* case, see FORCIBLE ENTRY AND DETAINER, 5.
 - Public improvements, necessity for condemnation, see MUNICIPAL CORPORATIONS, 7.
 - Review, harmless error in rulings on, see APPEAL AND ERROR, 26-28.
 - Self-serving declarations, see DEATH, 1.
 - Sufficiency of showing to vacate judgment, see JUDGMENT, 4.
 - Sufficiency of to sustain findings or verdicts, see APPEAL AND ERROR, 20-22.
 - Testamentary capacity, see WILLS, 1.
 - To establish contract of employment, see CORPORATIONS, 4.
 - To support findings for personal injuries, see APPEAL AND ERROR, 30.
 - To sustain divorce for personal indignities, see DIVORCE, 2.
 - To sustain verdict for damages, see DAMAGES.
1. EVIDENCE—HYPOTHETICAL QUESTIONS—OPINIONS AS TO CONTRIBUTORY NEGLIGENCE—ADMISSIBILITY. In an action for damages sustained through the breaking down of a bridge under the weight of plaintiff's load and team, it is error to permit a witness to answer a hypothetical question as to whether the driver of the team on such a bridge should have known of the danger; since that would be the opinion of a witness as to plaintiff's contributory negligence, and involved no question of science or peculiar knowledge. *Curtis v. Barber Asphalt Paving Co.*..... 324
 2. EVIDENCE—EXPERTS. Hypothetical questions may properly be based upon the testimony of the party proposing them. *Hanstad v. Canadian Pac. R. Co.*..... 505

EVIDENCE—CONTINUED.

3. EVIDENCE—CERTIFIED COPIES FROM FOREIGN STATE—CERTIFICATE—SUFFICIENCY. The copy of the record of a marriage certificate of another state, not appertaining to any court, the record appearing to be the public record of a county, must be certified as required by U. S. Rev. Stat., § 906, to be admissible in evidence, and a certificate by a deputy clerk of such county to the effect that it was a true copy of the record in his office, under the seal of the county, is insufficient. *State v. Kniffen*..... 485
4. EVIDENCE—RECEIPT—ORAL EVIDENCE OF CONTRACT. A receipt for \$1,000, reciting that it was in part payment for certain land, does not preclude oral evidence of the actual contract of the parties where the same is consistent with the terms of the receipt. *Lazier v. Cady*..... 339
5. EVIDENCE—FEES OF EXPERT. A question as to how much a medical expert is paid for testifying in "these cases" is properly excluded as assuming that the witness had testified for the party in other cases than the one on trial, where there was no evidence of such fact. *Rowe v. Whatcom County R. & Light Co.*..... 658
6. EVIDENCE—EXPERTS—CURVATURE OF SPINE. In an action for personal injuries resulting in alleged curvature of the spine, whether the test applied by other physicians to determine the fact of the curvature was a fair or proper test is a proper matter of opinion for a medical expert, which it is error to exclude as being a question for the jury to determine. *Id.*..... 658
7. EVIDENCE—REBUTTAL. A physician who testified on plaintiff's case in chief that plaintiff had curvature of the spine, may be asked in rebuttal whether the test applied by other physicians was a fair test, when he was not questioned in chief as to any tests. *Id.*.... 658

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EXECUTION:

Authority of partner to execute note, see PARTNERSHIP, 1.

Of deed by wife upon substitution of new debt, see MORTGAGES.

Sale of exempt property, see EXEMPTIONS.

EXECUTION—CONTINUED.

1. EXECUTION—SALE—CONFIRMATION—INVALID JUDGMENT. Where a judgment purporting to foreclose a mortgage lien is void, in so far as it authorizes a sale of premises, the court may refuse to confirm the sale, upon the objection of the defendant who defaulted, and in such proceeding may determine whether the judgment must be set aside. *Stark Brothers v. Royce*..... 287
2. EXECUTION—HUSBAND AND WIFE—COMMUNITY PROPERTY—CERTIFICATE OF SALE—REDEMPTION. A certificate of sale issued to a husband, who is alone the judgment creditor, is not evidence of an interest in community real estate pending redemption, and notice of redemption to the husband alone is sufficient. *Carroll v. Hill Tract Improvement Co.*..... 569

EXECUTORS AND ADMINISTRATORS:

See WILLS.

1. EXECUTORS AND ADMINISTRATORS—NOTICE TO CREDITORS. A notice to creditors is not objectionable in that the administrator's signature was affixed thereto by his attorneys. *Meikle v. Cloquet*..... 513
2. SAME—ADMINISTRATION—QUALIFICATIONS—RESIDENCE—FRAUD. The fact that an administrator is a nonresident of the state does not amount to such a fraud as to avoid the proceedings had. *Id.*... 513
3. SAME—NOTICE TO CREDITORS—FRAUD. Fraud in preventing a creditor from presenting his claim against an estate within the proper time cannot be predicated upon the fact that the attorney of the administrator declined, upon request by mail, to look after the collection of the debt because employed by the administrator, where such answer was promptly mailed. *Id.*..... 513
4. SAME. It cannot be claimed that an administrator fraudulently misled a creditor as to the time for presenting his claim, where he gave the proper notices and personally notified the creditor of the necessity of presenting the claim. *Id.*..... 513

EXEMPTIONS:

Assessment of school property for local improvements, see MUNICIPAL CORPORATIONS, 10, 11.

Delay in subjecting homestead to sale for excess of exemption, see FRAUDULENT CONVEYANCES, 4.

Land leased from state, assessment for benefits, see MUNICIPAL CORPORATIONS, 9.

Of bailee for loss of goods, see WAREHOUSEMEN.

1. EXEMPTIONS—HOMESTEADS—EXEMPTION OF PROCEEDS OF SALE. Under Bal. Code, §§ 5219 and 5247, authorizing the voluntary sale of an exempt homestead free from all claims or liens, and under a liberal construction of the exemption laws, the proceeds of such sale which the owner intends in good faith to reinvest in another homestead are exempt from garnishment. *Becher v. Shaw*..... 166

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As element of robbery, see **CRIMINAL LAW**, 1.

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Of vendor, recovery of purchase money, see **VENDOR AND PURCHASER**, 3.

FEAR:

As element of robbery, see **CRIMINAL LAW**, 1.

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Of expert, evidence of, see **DAMAGES**, 4.

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See **MASTER AND SERVANT**, 7-9.

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See **CRIMINAL LAW**.

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FLIGHT:

Instruction assuming flight, see **CRIMINAL LAW**, 16.

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As element of robbery, see **CRIMINAL LAW**, 1, 14.

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FORCIBLE ENTRY AND DETAINER:

Judgment against husband alone, ouster from community estate, see **HUSBAND AND WIFE**, 2.

1. **FORCIBLE ENTRY AND DETAINER—STATUTE—AMENDMENT—CONSTRUCTION.** The amendatory act of 1905, p. 173, is not a re-enactment of the forcible entry and detainer act of 1891, p. 179, § 1, in view of the fact that different pleadings are provided for, no writ of restitution is authorized until final judgment, and different results follow failure to prove the entry, demand and refusal to surrender the premises. *Columbia & Puget Sound R. Co. v. Moss*..... 589
2. **FORCIBLE ENTRY AND DETAINER—GROUNDS OF ACTION—RIGHTS OF PLAINTIFF.** In an action for forcible entry and detainer in which the complaint alleges causes of action under the general act, as amended by the Laws of 1905, in which the forcible entry or unlawful detainer must be proved, and under the act of 1891, under which the superior title prevails, the plaintiff must be held to have elected to proceed under the general act, where he sued out a writ of restitution and failed to set out an abstract of title, the abstract being required and the writ not authorized under the act of 1891. *Id.*.. 589
3. **FORCIBLE ENTRY AND DETAINER—STATUTES—CHANGE OF REMEDY.** A defendant, guilty of forcible entry and detainer prior to the amendatory act of 1905, cannot claim that such act does not apply, since the act was only a change of remedies, affecting no vested right. *Id.*..... 589
4. **FORCIBLE ENTRY AND DETAINER—REMEDY—EJECTMENT.** The general forcible entry and detainer act applies in many cases where ejectment was the remedy under former laws. *Id.*..... 589
5. **SAME—EVIDENCE—PRIMA FACIE CASE.** Proof of plaintiff's title, that the defendant entered without permission or color of title, that notice to remove was given, and surrender refused, makes out a *prima facie* case of forcible entry and detainer under the act of 1905, precluding the granting of a nonsuit. *Id.*..... 589

FORECLOSURE:

Effect of *lis pendens*, see **LIS PENDENS**.

Of lien, see **MECHANICS' LIENS**.

Nonjoinder of party as defense, see **EJECTMENT**.

Of local improvement assessments, see **MUNICIPAL CORPORATIONS**, 19-21.

Of mortgage, refusal to confirm sale, see **EXECUTION**, 1.

Of tax lien, see **TAXATION**, 10-16.

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In preventing presentment of claims, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.

In procuring deed to state lands, see **PUBLIC LANDS**, 3.

Nonresidence of administrator as constituting, see **EXECUTORS AND ADMINISTRATORS**, 2.

Quieting title on ground of, limitations, see **LIMITATION OF ACTIONS**.

Sales of realty, see **VENDOR AND PURCHASER**, 3.

Trial of issue in securing state deed, see **APPEAL AND ERROR**, 37.

FRAUDS, STATUTE OF:

1. **FRAUDS—STATUTE OF—SALE OF LANDS—MEMORANDUM—ORAL AUTHORITY TO SIGN—BROKERS—STATUTES—CONSTRUCTION.** Laws 1905, p. 110, amending the statute of frauds and requiring a contract for the employment of a broker to be in writing, does not change the rule in this state that the authority of a broker to execute a written contract for the sale of lands need not be in writing. *Peirce v. Wheeler*..... 326
2. **SAME—MEMORANDUM OF SALE—DEFINITENESS—SPECIFIC PERFORMANCE.** A broker's memorandum of sale of real estate which describes the lots, and states all the terms of payment, is sufficiently definite for specific enforcement. *Id.*..... 326

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—COMPLAINT—INSOLVENCY.** The complaint in an action by a creditor to set aside a fraudulent composition with creditors is demurrable where it fails to allege either the insolvency of the debtors or an execution and return of *nulla bona*. *McAvoy v. Jennings*..... 79
2. **SAME—PREFERENCES.** A debtor in failing circumstances may make a preference to a portion of his creditors, transferring his property to a trustee for equal division among such of the creditors as will stipulate to discharge their claims upon receiving their pro rata share of the assets. *Id.*..... 79
3. **SAME—SALES IN BULK—COMPOSITIONS WITH CREDITORS.** A transfer of a stock of goods to a trustee, to be sold and applied to debts as a composition with all creditors who would discharge their claims upon receiving their pro rata share of the proceeds, is not a sale of goods in bulk within the meaning of Laws 1901, p. 222, regulating such sales. *Id.*..... 79

FRAUDULENT CONVEYANCES—CONTINUED.

4. **FRAUDULENT CONVEYANCES—HOMESTEADS—JUDGMENTS—LIEN.** Conveyances of a homestead cannot be fraudulent as to a judgment creditor who, during the lifetime of his lien, took no steps to subject to his judgment its excess of value over and above the statutory allowance for a homestead. *Meikle v. Cloquet*..... 513

GARNISHMENT:

Property exempt from, see **EXEMPTIONS.**

GOOD FAITH:

To sustain title by prescription, see **ADVERSE POSSESSION**, 2, 3.

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Right of guarantor to mechanics' liens, see **MECHANICS' LIENS**, 4.

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Necessity of proof to identify letter, see **CRIMINAL LAW**, 8.

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In admission and exclusion of evidence, see **APPEAL AND ERROR**, 26-29.

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See **EXEMPTIONS.**

Conveyance of as fraud on creditors, see **FRAUDULENT CONVEYANCES**, 4.

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See **DIVORCE.**

Authority of wife to sell community property, see **VENDOR AND PURCHASER**, 5.

Community property, evidence of interest in, see **EXECUTION**, 2.

Competency as witnesses, see **CRIMINAL LAW**, 18.

Wife necessary party to execution of deed as security for new debt, see **MORTGAGES.**

1. **HUSBAND AND WIFE—LIABILITY OF WIFE FOR HUSBAND'S DEBTS—LAWS OF FOREIGN STATE—CONSTRUCTION.** The laws of Montana requiring the wife to file an inventory of her separate property having been held by the supreme court of Montana to be repealed, and there being no community property system in Montana, the separate property of a wife, situated in this state, is not subject to liability upon the note of the husband executed in Montana, where the note was not given for the necessities mentioned in Montana Civil Code, § 227. *Mantle v. Dabney*..... 193

HUSBAND AND WIFE—CONTINUED.

2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—JUDGMENT OF FORCIBLE ENTRY AGAINST HUSBAND ALONE.** A judgment of forcible entry and detainer against a husband alone ousting a husband and wife from community property is void, where both were in peaceable possession by no act of trespass or wrongful entry by the husband. *Gustin v. Crockett*..... 536

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INSURANCE:

1. **INSURANCE—FORFEITURE—NONPAYMENT OF PREMIUMS—NOTICE—CHANGE OF ADDRESS.** Where in accordance with the provisions of the policy, the by-laws of the company, and the laws of the state, notice of premiums due were mailed to the insured at his duly authorized postoffice address, in Butte, Montana, failure to receive the notice by reason of removal to Florida does not keep the policy alive, nor does correspondence respecting a mortuary call stating that the insured left home hurriedly and asking that receipt therefor be mailed to a given address in Florida, amount to sufficient notice to the company of a permanent change of address. *Smith v. Mutual Reserve Life Insurance Co.*..... 315
2. **SAME—NECESSITY OF NOTICE TO BENEFICIARY.** In such a case, it is not necessary to give notice to the beneficiary who was the wife of the insured, especially where she was notified that the next notice would be mailed to the insured at his authorized address. *Id.*... 315
3. **SAME—DATE OF ACCRUAL OF PREMIUMS—ACQUIESCENCE IN PROVISIONS OF POLICY.** Upon a failure to pay a premium when due according to the terms of the policy, it cannot be claimed that the policy did not go into effect until some months after its date and that premiums were not due at the time specified, where for eight years payments had been demanded and made in accordance with the terms of the policy. *Id.*..... 315
4. **INSURANCE—CHANGE OF RISK—PROVISIONS OF POLICY—CONSTRUCTION—LEASE UNDER BURGLARY INSURANCE.** A policy of insurance against loss by burglary while the premises are actually occupied by the assured, providing that the same shall be void if the risks are changed without the written consent of the company, is not avoided by reason of the fact that the owner leased the premises without such written consent, where a further clause in the policy declares that it shall be void in case the premises are left unoccupied for a period exceeding six months without the written consent of the company, in view of the rule that inconsistent clauses shall be construed most strongly in favor of the assured. *Thomson v. United States Fidelity & Guaranty Co.*..... 388
5. **INSURANCE—LOSS BY FIRE—CONDITIONS OF POLICY—PROOFS OF LOSS—SUFFICIENCY.** Where a policy of fire insurance limited the liability to three-fourths of the cash value of the property at the time of the loss, and provided, as a condition precedent to action, that the proofs of loss should state the actual cash value of the property at the time of the loss, proofs of loss, stating only the estimated cost value of the material at the time of the construction of the building, are insufficient to sustain an action, where the specific objection to the proofs was pointed out to the assured, who fully understood the same, and persisted in refusing to give the actual value, which had been overstated in his application for insurance. *Davis v. Pioneer Mutual Insurance Association.*..... 532

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6. **INSURANCE—LOSS BY FIRE—CONVEYANCE OF INSURED PROPERTY—PURCHASE-MONEY MORTGAGE BY VENDEE—CONDITIONS AND PROVISIONS OF POLICY—CONSTRUCTION.** A policy of fire insurance providing that any change in interest title or possession of the property insured shall work a forfeiture, unless agreed to, is rendered void by an absolute sale of the property, with a purchase-money mortgage back to the insured to secure part of the price, without notice to the company; since the terms of the policy are unambiguous, and the mortgage back was a mere security retaining no title in the insured. *Jump v. North British Mercantile Insurance Co.*..... 596

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- Award of tender by, see DEPOSIT IN COURT.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS—LICENSE—MUNICIPAL CORPORATIONS—POWER TO REVOKE LICENSE—REVIEW.** A city council has power, under Bal. Code, § 2934, giving it sole and exclusive authority to restrain or license the sale of intoxicating liquors, to arbitrarily revoke a license, the statute not providing for notice, hearing or method of finding the facts; hence the council's action is not subject to review by the courts. *State ex rel. Aberdeen v. Superior Court.*..... 526
2. **SAME—PROHIBITION—TO REVIEW REVOCATION OF LIQUOR LICENSE—ADEQUATE REMEDY BY APPEAL.** Prohibition lies to prevent the superior court from reviewing the action of a city council in revoking a liquor license, since the action is legislative and not judicial, and since the action is discretionary and not subject to review; and the remedy by appeal is inadequate. *Id.*..... 526

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As affecting interest of persons not parties to suit, see SPECIFIC PERFORMANCE, 2.

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Vacation, waiver of right, see APPEARANCE, 1.

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1. JUDGMENT—RES ADJUDICATA—ESTOPPEL. While a judgment quieting title to a portion of a tract of land is not *res adjudicata* as to the balance of the tract, yet where the parties to another action to quiet title to the balance are the same, the issues the same, and the evidence would be the same as in the former action, the judgment therein operates as an estoppel against the assertion of title determined by such judgment. *Bird v. Winyer*..... 264

JUDGMENT—CONTINUED.

2. JUDGMENT—RES ADJUDICATA. A judgment against the vendor of personal property denying his right to recover possession, in an action brought on the theory that the transaction was a conditional sale, is *res adjudicata* and a bar to a subsequent action of replevin brought by the plaintiff against the same vendees on the theory of rescission of the sale for fraudulent representations of the vendees inducing the sale. *Cuschner v. Longbehn*..... 546
3. JUDGMENTS—DEFAULT—VACATION—DIRECT ATTACK—EFFECT OF RECITALS AS TO DUE SERVICE. The recitals of due service contained in a default judgment is not conclusive upon a direct attack by appeal from the judgment, on overruling an objection to the jurisdiction and motion to vacate the default. *French v. Ajax Oil & Development Co.*..... 305
4. JUDGMENT—DEFAULT—VACATION—SUFFICIENCY OF SHOWING. A motion to vacate a default judgment entered in a proceeding to establish a lost corner is properly denied where, upon the showing made, it appears that the corner was lost and defendant's evidence as to its location was too indefinite to warrant findings in support of his contention. *Strunz v. Hood*..... 99
5. JUDGMENT—DEFAULT—RIGHT OF VACATION. Under Bal. Code, §§ 4878, 4879, a nonresident defendant is not entitled to have a default set aside, and to defend as a matter of right at any time before judgment, except upon sufficient cause shown. *Id.*..... 99
6. SAME—BOUNDARIES—ACTION TO ESTABLISH. An action to have a lost corner established by survey is not an action for the recovery of real property, within the meaning of Bal. Code, § 5518, allowing a nonresident defendant to appear after default and defend at any time before judgment. *Id.*..... 99
7. JUDGMENTS—VACATION—NOTICE. Vacation of a judgment cannot be objected to for want of notice, where the record shows service of notice of motion and an appearance by the party to contest the motion. *Stark Brothers v. Royce*..... 287
8. SAME—MODIFICATION FOR IRREGULARITY. A judgment irregularly obtained is properly modified upon motion. *Id.*..... 287
9. SAME—INVALIDITY. A void judgment may be set aside upon motion. *Id.*..... 287
10. SAME—VACATION OF DEFAULT—IRREGULARITY. A default judgment beyond the purport and scope of the pleadings is irregularly obtained, rather than erroneous, and may be set aside on motion. *Id.*..... 287
11. JUDGMENT—VACATION—TERMS—ATTORNEYS' FEE. Upon the vacation of a judgment entered for want of prosecution, it is discretionary for the trial court to make the same conditional upon the payment

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- of an attorney's fee in excess of the statutory fee for the trial of a cause without a jury. *Redding v. Puget Sound Iron & Steel Works*..... 200
12. JUDGMENT—DEFAULT—ANSWER TO INTERROGATORIES—MOTION TO MAKE MORE SPECIFIC—TIME FOR FILING. Upon the granting of a motion to strike certain answers to interrogatories, for the reason that they are insufficient in certain particulars, it is error to grant judgment of default without requiring more specific answers and fixing a time for the filing thereof, in order that upon failure to file the same the time of a default may be definitely known. *Lawson v. Black Diamond Coal Min. Co.*..... 26
13. JUDGMENT—FAILURE TO ANSWER INTERROGATORIES—CONSTITUTIONAL LAW—DUE PROCESS. Bal. Code, § 6013, authorizing the court to strike a pleading and give judgment against a party for failure to answer interrogatories is not unconstitutional as depriving a party of property without due process, since such failure to answer may be construed as an admission of material facts; hence such judgment is justified only where the failure to make discovery as to material facts is alleged and proved. *Id.*..... 26
14. SAME. In an action against a corporation to recover a broker's commission, interrogatories respecting negotiations and correspondence had with a stockholder relate to immaterial matters, as the stockholder has no power to bind the corporation; and failure to answer the same does not warrant judgment. *Id.*..... 26
15. SAME—DISCOVERY—PRODUCTION OF DOCUMENTARY EVIDENCE. After failure of a defendant to specifically answer interrogatories, filed for a discovery of facts and documents material to the support of the action, under Bal. Code, § 6009, the court is not warranted in striking the answer and entering a default judgment for failure to produce and attach to the answer certain correspondence called for by the plaintiff under Bal. Code, § 6047, making provision for the inspection of books and papers in hands of the opposite party material to the issue, and for permission to make copies thereof, upon pain of exclusion of the evidence as punishment for contempt; since it was not the intention of the legislature to furnish a cumulative remedy by these two sections. *Id.*..... 26
16. JUDGMENTS—REVIVOR—STATUTES—CHANGE OF REMEDY. The legislature has power to reduce the time within which a proceeding may be commenced to revive an existing judgment, provided the right is not thereby arbitrarily and summarily cut off; since the same pertains only to the remedy and does not affect vested rights. *Gaffney v. Jones*..... 158
17. JUDGMENTS—LIEN—REVIVAL. A judgment upon a contract prior to the act of 1897 may be revived by a direct action at law brought thereon. *Meikle v. Cloquet*..... 513

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18. **SAME—CREDITOR'S BILL—LIEN TO SUPPORT.** Where an action upon a judgment is changed by amendment to make it in the nature of a creditor's bill to set aside conveyances preventing the collection of the judgment, the lien of the judgment is not continued by the proceeding after the expiration of six years from its date, if controlled by the law of 1897, even though the amendment was made prior to the expiration of such period; as the law of 1897 terminates the lien absolutely after six years. *Id.*..... 513
19. **JUDGMENT—ENTRY—STATUTES—CONSTRUCTION.** Bal. Code, § 4804, providing that upon proof of default, the court "shall" thereupon enter judgment, is not mandatory in the sense that failure to enter judgment immediately will result in loss of jurisdiction. *Peirce v. National Bank of Germantown*..... 404

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- Curative acts, execution of tax deed, see **TAXATION**, 8.
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- Levy of poll tax, see **TAXATION**, 3.
- Revival of judgment, change of remedy, see **JUDGMENT**, 16-18.

LETTERS:

- Admissibility in prosecution for robbery, see **CRIMINAL LAW**, 8.
- As evidence of intent to contribute to support, see **DEATH**, 1.
- Identification in prosecution for robbery, see **CRIMINAL LAW**, 8.

LEVY:

- Of taxes, see **TAXATION**.

LICENSES:

- For sale of intoxicating liquors, revocation, see **INTOXICATING LIQUORS**.

LIENS:

See **MECHANICS' LIENS**.

Mortgage, see **MORTGAGES**.

Pledge, see **PLEDGES**.

Delay in subjecting homestead to sale for excess of exemption, see **FRAUDULENT CONVEYANCES**, 4.

For local improvement assessment, see **MUNICIPAL CORPORATIONS**, 19, 20.

For money paid on execution sale, see **QUIETING TITLE**.

Revival of judgment on contract, see **JUDGMENT**, 17, 18.

LIFE INSURANCE:

See **INSURANCE**, 1-3.

LIMITATION OF ACTIONS:

See **ADVERSE POSSESSION**.

For wrongful diversion of local improvement funds, see **MUNICIPAL CORPORATIONS**, 24, 25.

Termination of judgment lien, see **JUDGMENT**, 18.

1. **LIMITATION OF ACTIONS—FRAUD—QUIETING TITLE.** An action to quiet title on the ground of fraud, not commenced until more than twenty years after discovery of the fraud, is barred by the statute of limitations. *Carroll v. Hill Tract Improvement Co.*..... 569
2. **SAME—TOLLING THE STATUTE.** The running of the statute of limitations against relief on the ground of fraud is not affected by ill health or negotiations that did not commence until the statute had run. *Id.*..... 569

LIS PENDENS:

1. **LIS PENDENS—NOTICE—EFFECT ON PRIOR UNRECORDED INTEREST.** The filing of a *lis pendens*, in an action to foreclose a street assessment lien, and the subsequent judgment and sale, cuts off any interest of the parties to the action, and also of one claiming under a party by an unrecorded assignment of a sheriff's certificate of sale, whether the purchaser at the foreclosure sale had notice of such assignment or not, when such assignment was inferior to the lien foreclosed; hence a quitclaim deed from such party or assignee, made after judgment, conveys no title. *Wright v. Jessup*..... 618

LOGS AND LOGGING:

Obstruction of navigable stream, see **NAVIGABLE WATERS**, 1-3.

MACHINERY:

Dangerous machinery, see **NEGLIGENCE**, 2.

Duty to guard, see **MASTER AND SERVANT**, 11.

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 10-12, 14.

MALICIOUS TRESPASS:

See CRIMINAL LAW, 2-4.

MANDAMUS:

Trial of issue of fraud in securing state deed, see APPEAL AND ERROR, 37.

1. MANDAMUS—PARTIES PLAINTIFF—JOINDER. Two persons who have been elected to a town council may join as plaintiffs in a proceeding to compel the canvass of the election returns. *State ex rel. Howe v. Kendall* 542
2. SAME—PARTIES DEFENDANT—JOINDER. In a proceeding to compel the canvass of election returns by the town board of canvassers, there is no defect of parties defendant, where the writ runs against the council and the mayor, who is a member of the board, and was served on him and on a majority of the council, although members of the council not recognized were not joined or served. *Id.*... 542
3. SAME—ELECTIONS—CANVASS OF RETURNS—REMEDIES. Mandamus is the proper remedy to secure a canvass of the returns of a town election, where the canvassing board refuses to act, whether the act is ministerial or there is a refusal to exercise a discretion in a quasi judicial capacity. *Id.*..... 542
4. SAME—COSTS. Mandamus is a civil remedy in which the costs may be awarded against the defendants. *Id.*..... 542
5. MANDAMUS—TO STATE OFFICER—JUDICIAL OR MINISTERIAL CAPACITY—PRACTICE UNDER CODE. Under the code, it is immaterial whether mandamus to a state officer is sought to review the exercise of judgment and discretion or acts done in a purely ministerial capacity, as the proceeding is a form of civil action in which any appropriate relief may be awarded. *State ex rel. Gillette v. Clausen*..... 437
6. MANDAMUS—TO COMPEL TRIAL—ACTIONS—STAY—DISCRETION OF COURT. Mandamus does not lie to control the exercise of discretion by a trial judge in refusing to proceed with the trial of an action for damages upon an injunction bond, until after a second action between the same parties to determine the rights of the parties in and to the property damaged is first brought to an issue and tried, or the two actions tried together, where the business of the court so requires or would be facilitated thereby. *State ex rel. McDonald v. Steiner* 150

MANDATE:

See MANDAMUS.

MANDATORY:

Statute, see JUDGMENT, 19.

MARRIAGE:

See BREACH OF MARRIAGE PROMISE.

Copy of record of marriage certificate as evidence, see EVIDENCE, 3.

Invalidity of, burden of proof, see CRIMINAL LAW, 12.

MASTER AND SERVANT:

Action for death of minor, see **DEATH**, 2, 3.

Collection of poll tax by employer, see **TAXATION**, 4.

Harmless error in interposing defense of fellow servant, see **APPEAL AND ERROR**, 23.

Liens for labor and materials, see **MECHANICS' LIENS**.

Personal injuries, excessive damages, see **DAMAGES**, 5.

1. **MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS.** The doctrine of assumption of risks of danger from unsafety of the place, is not applicable to an unskilled man in a mill who is ordered from place to place, and from whom ready obedience is expected or necessary, unless the peril is so apparent that there can be no conflicting opinion between men of ordinary prudence. *Bailey v. Mukilteo Lumber Co.*..... 581
2. **SAME—DANGER OF COUPLING CARS—ASSUMPTION OF RISK.** A boy seventeen years of age who was given no instructions as to the coupling of cars cannot be said to have assumed the risk of injury from having his hand caught, merely from the fact that he testified that he knew he would be injured if he held on to the link until the drawheads came together. *Stark v. Port Blakely Mill Co.*... 309
3. **MASTER AND SERVANT—COLLISION OF TRAINS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** In an action for the death of a locomotive engineer, killed in a collision, within terminal grounds, the evidence conclusively establishes the contributory negligence of the deceased, so that there is no room for difference of opinion in the minds of reasonable men, and the case is properly taken from the jury, where it appears that deceased was in the sole charge of his train and the brakes, and familiar with the location, and required to know the rule that all trains must approach and pass through the yards "under full control," i. e., so as to be able to stop within vision, and that he collided with the engine in the terminal grounds, while day was breaking, and while going at the rate of at least eight miles an hour, the distance of unobstructed view being seven hundred feet, and that his failure to observe the rules directly contributed to his injury; as disobedience of rules contributing to the injury conclusively establishes negligence. *Brown v. Northern Pac. R. Co.*..... 1
4. **MASTER AND SERVANT—INJURY TO CAR REPAIRER—CONTRIBUTORY NEGLIGENCE—FAILURE TO DISPLAY SIGNAL.** A car repairer who was injured while working between two cars, by reason of the coupling on of a switch engine, is guilty of contributory negligence precluding a recovery, where he failed to protect his position by displaying a blue flag in accordance with the rules and custom of the company, with which he was familiar. *Losnes v. LeRoy*..... 416

MASTER AND SERVANT—CONTINUED.

5. SAME—CONTRIBUTORY NEGLIGENCE—INJURY TO SAWYER'S HELPER ON SPLITTER DECK. In an action for personal injuries sustained by a helper on a splitter deck while endeavoring, under directions from the sawyer, to dislodge a split log which had slid out of place, a nonsuit is proper on the ground of plaintiff's contributory negligence, where it appears that the injury was caused by the splitting of the log while endeavoring to dislodge it with a jack, that plaintiff had dogs which he might have used to prevent the splitting of the log, that logs frequently slid around in that way, and that he was familiar with the work and looked after the details. *Bailey v. Mukilteo Lumoer Co.*..... 581
6. MASTER AND SERVANT—INJURY TO SAW FILER BY STARTING SAW—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY. A saw filer, who had a right to rely upon a signal for the starting of a mill, is not guilty of contributory negligence, as a matter of law, but the question is for the jury, where he was injured by the starting of the mill without warning, and the evidence is conflicting as to whether he assumed a dangerous position in doing the work or should have released the belt tightener before commencing work. *Comrade v. Atlas Lumber & Shingle Co.*..... 470
7. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS. The motorman and conductor on a street car are fellow servants of the motorman and conductor on another car of the same line going in the opposite direction, so that one cannot recover for injuries received in a collision through the neglect of the other to turn on the lights of a block system on entering the block, where it appears that the line was a single track line twelve miles long, with but a few cars in service, that the motormen were constantly meeting on schedule time fixed by the company and their duties were coordinate, so that they necessarily knew the character, habits, and capacity of each other, and so had opportunity of exercising mutual influence upon one another. *Berg v. Seattle, Renton etc. R. Co.*.. 14
8. SAME—FELLOW SERVANTS—WARNING OF STARTING MACHINERY. An engineer whose duty it is to give a warning by two blasts of the whistle before starting the machinery in a mill, so that employees may get out of danger, is not a fellow servant of a saw filer engaged in filing saws during the noon hour; since the giving of such warning was one of the nondelegable duties of the master. *Comrade v. Atlas Lumber & Shingle Co.*..... 470
9. MASTER AND SERVANT—FELLOW SERVANTS. There is no question of fellow servant involved where an employee was injured by defects in appliances causing the throwing of a belt, merely by reason of the fact that a witness thought the accident due to the inexperience of another employee who adjusted the belt upon the pulley on the

MASTER AND SERVANT—CONTINUED.

- floor above, where it appears that the accident did not occur until after such adjustment had been made and when the two employees were doing nothing in common; and where the act of such co-employee could not have caused the injury irrespective of the negligence of the master. *Schwaninger v. McNeeley & Co.*..... 447
10. MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCES—INSTRUCTIONS. An instruction that the master is not an insurer of the safety of its employees, but that the law requires that it furnish a safe place, etc., sufficiently complies with the request for an instruction that it is not an insurer of the safety and sufficiency of the appliances employed, and was not required to anticipate accidental happenings. *Id.*..... 447
11. SAME—COMPLIANCE WITH FACTORY ACT. Where an action for injuries sustained through the failure to maintain reasonable safeguards is tried as an action at common law without any reference to the factory act, it is not error to refuse an instruction to the effect that no statute required the use of such safeguards. *Id.*..... 447
12. SAME—DUTIES OF SERVANT—INSTRUCTIONS. An instruction relating to the duty to warn a servant of unknown dangers, where he is called from his ordinary duties, is sufficiently within the issues where a servant, whose regular duty was that of fireman, was injured in the adjustment of a belt, through dangers unknown to him, where he had been employed but a short time, although he had frequently adjusted the belt; as the complaint may be presumed amended to conform to proof of such facts, admitted without objection. *Id.*.. 447
13. MASTER AND SERVANT—NEGLIGENCE—SCOPE OF EMPLOYMENT—COUPLING CARS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to make it a question for the jury whether a minor was to couple cars as a part of his duty, where it appears that his duties were to pull slack for the loaders and clean off the track, and had been told to "do anything that he saw to be done;" that he saw the cars needed coupling and previously coupled a car in the presence of the head loader. *Stark v. Port Blakely Mill Co.*..... 309
14. SAME—NEGLIGENCE OF MASTER—APPLIANCES—STREET RAILWAY BLOCK SYSTEM. A charge of negligence, made by a motorman against a street railway company for not maintaining a sufficient block system, is not sustained where the plaintiff testified that the collision would not have occurred if the motorman on the other car had obeyed the rules to turn on his lights before entering the block, and where the plaintiff had worked on the system for eighteen months and made no complaint of the system. *Berg v. Seattle, Renton etc. R. Co.*..... 14

MECHANICS' LIENS:

Appeal in foreclosure, amount in controversy, see APPEAL AND ERROR, 1.

MECHANICS' LIENS—CONTINUED.

1. **MECHANICS' LIENS—FORECLOSURE—EVIDENCE—DELIVERY OF MATERIAL.** In an action to foreclose a mechanics' lien, there is not sufficient evidence of delivery of the material at the property in question, where the only testimony was that some of the material was given the appellant's deliveryman with directions for delivery, and most of it to a subcontractor, the contractor being engaged in a number of houses, and neither the deliveryman or subcontractor were called to testify. *Knudson-Jacob v. Brandt*..... 68
2. **SAME—AMOUNT.** In an action to foreclose a mechanics' lien, there is not sufficient evidence of the amount to be charged to the property, where there was but one general account for different houses, charging various items to the contractor, with general credits, from which it could not be clearly ascertained what was chargeable against the property, or what amount remained unpaid. *Id.*..... 68
3. **MECHANICS' LIENS—BUILDING MATERIALS—FORECLOSURE—STATUTES—CONSTRUCTION.** Under Bal. Code, § 5900, giving a lien for "furnishing materials to be used in the construction" of any building, no lien can be established unless it is made to appear that the materials were actually used or delivered on the premises for use in the construction of the building. *Fuller & Co. v. Ryan*..... 385
4. **MECHANICS' LIEN—RIGHT OF GUARANTOR TO MAINTAIN.** One who guarantees a surety company upon a building contractor's bond against loss by reason of failure to perform the contract cannot claim a mechanics' lien on the building, under a subcontract subsequently entered into with the contractor. *Todd v. Fransvog*.... 520

MEMORANDA:

Required by statute of frauds, see **FRAUDS, STATUTE OF**, 2.

MINES AND MINERALS:

1. **MINES AND MINERALS—CONTRACT—PERFORMANCE TO SATISFACTION OF ENGINEER.** In an action upon a contract to construct a 350 foot slope in a mine to the satisfaction of defendant's engineer, the evidence is sufficient to show that it was done to the engineer's satisfaction, where it appears that a dispute arose upon the completion of the first 75 feet, which was unsatisfactory, whereupon the plaintiff stopped work until the differences were settled, and finished the balance of the work as directed by the engineer, and there was evidence that the defendant agreed to accept the first 75 feet before defendant went back to work. *Lang v. Crescent Coal Co.*..... 267

MINORS:

Action for death of, see **DEATH**, 2, 3.
 Injury to trespassers, see **ELECTRICITY**.
 Scope of employment, see **MASTER AND SERVANT**, 13.

MISCONDUCT:

Of counsel, see **TRIAL**, 8-10.

MISJOINDER:

Of cause of action, see **ACTION**.

Of parties in civil actions, see **MANDAMUS**, 1, 2.

MISREPRESENTATION:

In preventing presentment of claims, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.

MISTAKE:

In payment of taxes, see **ADVERSE POSSESSION**, 3.

Of clerk in filing bond, see **APPEAL AND ERROR**, 8, 10.

Time for payment of municipal bonds, see **MUNICIPAL CORPORATIONS**, 18.

MODIFICATION:

Of judgment, see **JUDGMENT**, 8.

Of requested instruction, see **TRIAL**, 1, 2.

MONEY RECEIVED:

Recovery of price paid for land, see **VENDOR AND PURCHASER**, 3.

MONUMENTS:

See **BOUNDARIES**, 1, 2.

MORTGAGES:

Absolute deed as, reformation of, see **ACTIONS**, 1.

Conveyance to mortgagee of estate indebted by void mortgage, see **WILLS**, 2.

Invalid judgment of foreclosure, refusal to confirm sale, see **EXECUTION**, 1.

Reformation of deed as mortgage, pleading, see **REFORMATION OF INSTRUMENTS**.

What is not, see **CONTRACTS**, 2.

1. **MORTGAGES—DEED BY HUSBAND AND WIFE AS SECURITY—PAYMENT AND SUBSTITUTING NEW DEBT—CONSENT OF WIFE.** Where a deed was executed by a husband and wife as security for a note, and the husband subsequently paid the note in full, but agreed that the deed should be held as security for another note then given by him, the deed was void as security for such note without some act equivalent to legal execution thereof by the wife for such purpose. *Manile v. Dabney*..... 193

MOTIONS:

Continuance in civil actions, see **CONTINUANCE**.

Dismissal of appeal, see **APPEAL AND ERROR**, 8-10, 19.

For new trial, assignment of error, see **APPEAL AND ERROR**, 17.

New trial in civil actions, see **NEW TRIAL**, 3.

Opening or vacating judgment, see **JUDGMENT**, 3-4, 7-10.

MUNICIPAL CORPORATIONS:

Estoppel by accepting benefits of unauthorized compromise, see ATTORNEY AND CLIENT, 1.

Foreclosure of street assessment lien, effect of *lis pendens*, see LIS PENDENS.

Law of case as to sufficiency of notice of claim, see APPEAL AND ERROR, 38.

Revocation of license, see INTOXICATING LIQUORS.

1. MUNICIPAL CORPORATIONS—RESOLUTIONS—AUTHORITY TO INSTITUTE CONDEMNATION PROCEEDINGS. Under Bal. Code, §1011, giving towns the power to establish and lay out alleys, the granting of a petition therefor, in the form of an order adopted by the city council with all the formalities required for the passage of an ordinance or resolution, is sufficient to authorize the institution of condemnation proceedings; as the order was in effect a resolution and the same need not be by ordinance. *State ex rel. Jones v. Superior Court*..... 476
2. MUNICIPAL CORPORATIONS—EMINENT DOMAIN—PUBLIC USES—ALLEYS. The power given to a town to condemn for "public corporate uses" includes the power to condemn lands for an alley necessary for the use of its inhabitants. *State ex rel. Jones v. Superior Court*..... 476
3. SAME—STATUTES. Laws 1893, p. 135, authorizing towns to condemn lands has not been superseded by subsequent statutes. *Id.* 476
4. SAME—PETITION—JURISDICTION TO CONDEMN. A town has power to condemn land for an alley upon its own initiative, and a petition by a majority of the property owners affected is therefore not a jurisdictional prerequisite. *Id.*..... 476
5. SAME—NECESSITY—ATTEMPT TO AGREE WITH OWNERS. Upon a condemnation proceeding by a town to open an alley through a block, it is not a condition precedent that the town should attempt to agree with the owners as to the price to be paid for the land taken. *Id.*..... 476
6. SAME—NECESSITY—APPEAL—REVIEW. Error in that the court ruled that the question of necessity rested with the city council will not be considered, where the ruling is not pointed out in the briefs, and the court found the necessity upon conclusive evidence. *Id.* 476
7. SAME—EVIDENCE OF NECESSITY—ADMISSIBILITY. Upon a condemnation proceeding by a town to open an alley, evidence to show want of necessity to the effect that the city had used a portion of adjacent land for an alley, is properly excluded; since an absolute necessity need not be shown. *Id.*..... 476
8. MUNICIPAL CORPORATIONS—CONTRACT FOR LOCAL IMPROVEMENTS—TIME OF PERFORMANCE—VALIDITY. Under a city charter and contract for improving a street, providing for a demurrage of \$25 per day if the work is not completed within one hundred and twenty days after execution of the contract, and that the work shall be completed

MUNICIPAL CORPORATIONS—CONTINUED.

- within one hundred and sixty days, and the contract void and all pay forfeited for failure "on the part of the contractor" to complete the same within such time, the contract is not avoided by failure of the contractor to complete the work within such time, where he delayed the work for some months after it was nearly completed, at the direction of the commissioner, and for the benefit of the city, the work being required to be done under the direction and to the satisfaction of the commissioner; since the delay was not due to the "failure of the contractor. *Hellar v. Tacoma*..... 250
9. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENT FOR BENEFITS—LANDS LEASED FROM STATE. A leasehold interest in state lands is not subject to an assessment for local improvements made prior to the time of the letting of the land by the state; and the assessment, if made after the bidding for the lease, can only be levied upon the leasehold interest. *Rabel v. Seattle*..... 482
 10. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—SCHOOL PROPERTY—EXEMPTION. The lots of a school district are subject to local improvement assessments under Laws 1893, p. 189, § 22, requiring cities to levy the assessment upon all property in the locality benefited by the improvement, in the absence of any expressed intent of the legislature to exempt such property, although school property is not in express terms directed to be assessed. *In Re Howard Avenue North, Seattle*..... 62
 11. SAME—TAXATION—Const., art. 7, § 2, exempting school district property from taxation does not prohibit a special assessment against the same to the extent of benefits from a local improvement. *Id.* 62
 12. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT DISTRICTS. Under Laws 1888, p. 16, a municipality of less than six thousand inhabitants has no power to create a special assessment district. *State ex rel. Security Sav. Soc. v. Moss*..... 91
 13. SAME—SPECIAL ASSESSMENT DISTRICTS. The general incorporation act of 1888 (Laws 1888, p. 224, § 23) empowers municipalities to create special assessment districts; and a contract by a city for a local improvement, agreeing to pay for the work as fast as the city collects and receives the special assessments, does not create a liability against the city. *Id.*..... 91
 14. SAME—LIABILITY WHERE SPECIAL ASSESSMENT INSUFFICIENT. Where a municipality, organized under the void act of 1888, contracted for street improvements payable with warrants on a special assessment fund was, after the completion of the work, reorganized under the act of 1890, and thereafter ratified the indebtedness for the street improvements aforesaid and declared it to be a town debt, warrants drawn on the general fund after the exhaustion of the special fund, in exchange for special assessment warrants, are without consideration and void; since the assessment district and not the city was liable therefor. *Id.*..... 91

MUNICIPAL CORPORATIONS—CONTINUED.

15. SAME—INDEBTEDNESS OF SPECIAL ASSESSMENT DISTRICT—RATIFICATION. The balance due a contractor upon the indebtedness of a special assessment district for a local improvement, after the assessment is exhausted, is not such a moral obligation of the town as can be ratified and made a legal debt of the town. *Id.*..... 91
16. SAME—GENERAL FUND WARRANTS—CONSIDERATION. Warrants on the general fund issued in exchange for special assessment warrants after the completion of improvements are without consideration where the city was not liable for the special warrants. *Id.*.... 91
17. MUNICIPAL CORPORATIONS—DEBT CREATED UNDER ILLEGAL INCORPORATION—WARRANTS ON SPECIAL IMPROVEMENT FUND—RATIFICATION—ISSUANCE OF FUNDING BONDS. Warrants drawn on a special improvement fund by a void municipality cannot, upon its subsequent valid incorporation, be ratified by the issuance of funding bonds to pay such indebtedness, thereby changing a special assessment liability to one of general character; since the assessment district, and not the city, was liable therefor. *State ex rel. Barnes v. Blaine.*..... 218
18. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—VALIDITY OF BONDS—MISTAKE AS TO PERIOD. Bonds for a local improvement, payable in cash or in ten annual installments, are not affected by a mistake in the original ordinance limiting the time for payment to five annual installments, where, upon discovery of the mistake, the city council passed another ordinance correcting the mistake, before levy of the assessment, the law not providing the time when the council should fix such time, and all the bidders and city officials having acted in the first instance under the impression that the annual installments were provided for; as no injury could have resulted to property holders under such circumstances. *Lister v. Tacoma.*.. 222
19. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—FORECLOSURE—STATUTES—CONSTRUCTION. Statutory provisions for the foreclosure of local improvement assessments are to be strictly construed, and an exact compliance with every requirement enforced. *Albring v. Petronio.*..... 132
20. SAME—SALE—NOTICE TO OWNER—PAYMENT OF TAXES DURING PERIOD OF REDEMPTION. Bal. Code, § 814, securing to the holder of a certificate of sale of land for a local improvement assessment a lien for the amount paid and for taxes levied previously or subsequently, requires such holder to pay subsequent taxes during the period of redemption as an additional means of notice to the owners of the land. *Id.*..... 132
21. SAME—NOTICE OF APPLICATION FOR DEED—DILIGENCE IN ASCERTAINING ADDRESS OF OWNER. Bal. Code, § 815, requiring the holder of such a certificate to give notice, by personal service or by publication, to the owners of the land that demand for a deed will be made, contemplates personal service if possible, and diligent search for the

MUNICIPAL CORPORATIONS—CONTINUED.

- owner; and a holder who fails to pay subsequent taxes, or make inquiry at the office of the county treasurer for the address of the owner who had paid such taxes, does not exercise the diligence required of him by the statute before a deed can be issued. *Id.*.... 132
22. MUNICIPAL CORPORATIONS—ASSESSMENTS—SALE OF LOTS—DEED—VALIDITY—FAILURE OF PURCHASER TO PAY TAXES. Under Tacoma city charter, §§ 148-150, providing that the purchaser of lots under sale for street assessments shall not be entitled to a deed until the payment by him of subsequent taxes and assessments, such payment is a condition precedent intended as notice to the owner, without which a deed is void. *Loeb v. Asberry*..... 427
23. SAME—REDEMPTION FROM SALE. Where the purchaser of lots sold for street assessments fails to give the owner constructive notice by the payment of subsequent taxes, the owner may redeem the same at any time as though no sale had been made, under Laws 1899, p. 234, § 5, allowing redemption at any time within thirty days after notice of the assessment. *Id.*..... 427
24. MUNICIPAL CORPORATIONS — DIVERSION OF FUNDS — LIMITATION OF ACTIONS. An action against a city for the wrongful diversion of local improvement funds by the payment of warrants out of their order, is not barred until three years after the holders of warrants discover the diversion; and the holder is not bound to take notice of city records showing such diversion, where the city treasurer is required, and failed, to give notice when funds were in his hands; especially within the time that the city might collect such funds. *Northwest Lumber Co. v. Aberdeen*..... 261
25. SAME—NOTICE—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the holder of warrants had no notice of the city's misappropriation of a special fund by the payment of warrants out of order, where the manager's positive statement is that he did not examine the warrant register and had no notice of payment out of order, although it appears by his letter that some of the city records were examined, upon an attempt by him to obtain a partial payment which was refused for want of funds. *Id.*..... 261
26. MUNICIPAL CORPORATIONS — STREETS — AUTOMOBILES — REGULATION OF SPEED ORDINANCE—VALIDITY—STATUTES—CONSTRUCTION. Chapter 154, Laws 1905, p. 293, providing for a state license of automobiles, and declaring that cities shall have no power to require any such license or to exclude automobiles from the free use of the streets, does not prevent a city from limiting the speed of automobiles within its limits to six miles per hour, although laws 1905, § 10, provides that such speed shall not, in thickly settled or business portions of the city, exceed twelve miles per hour; in view of § 12 of said chapter, providing that no greater speed shall be attained than is reasonable and proper, having regard to the traffic, etc. *Bellingham v. Clissa*..... 397

MUNICIPAL CORPORATIONS—CONTINUED.

27. **SAME—CLASS LEGISLATION.** The proviso to § 12 of chapter 154, Laws 1905, to the effect that nothing in the chapter shall be construed to limit the power of cities to regulate automobiles which are offered to the public for hire, cannot be construed as showing an intention to limit the power to the regulating of the speed of automobiles kept for private use, as such construction would make the statute class legislation; but the proviso must be construed to relate to usual regulations of conveyances kept for public hire. *Id.*... 397
28. **MUNICIPAL CORPORATIONS—NEGLIGENCE—DEFECTIVE SIDEWALKS—DEFENSES—EXTENT OF WALKS.** In an action for personal injuries sustained through a defective sidewalk, it is not error to exclude evidence of the extent of the walks under the control of the city, to show the diligence of the city, where the contest is over the question as to whether there was any defect at all in the walk, and the walk had been out of repair for more than a year. *Hammock v. Tacoma*..... 623
29. **MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—KNOWLEDGE OF DEFECT—EVIDENCE—SUFFICIENCY.** Proof that a sidewalk had been constructed for a number of years, and that it had been out of repair and unsafe in places on each side of and near to the place of the accident for more than a year, is sufficient to show constructive notice on the part of the city of the particular defect, although the same was not so apparent that it could be observed by the exercise of ordinary care by one using the walk; since the city's duty to inspect and take notice of its condition is greater than that of a traveler observing only the surface of the walk. *Id.*..... 623

MUTUAL BENEFIT SOCIETIES:

See **BENEFICIAL ASSOCIATIONS.**

NAVIGABLE WATERS:

1. **NAVIGABLE WATERS—OBSTRUCTION—RIPARIAN RIGHTS—LOGS AND LOGGING—BOOM COMPANIES.** The right of riparian owners to the unobstructed navigation and use of the waters of a meandered navigable stream is not in any way affected by the statutory provisions (Laws 1889-90, p. 470, § 1) authorizing the incorporation of boom companies and conferring power on such companies to acquire and use real and personal property necessary for carrying on the business of booming logs, by the right of eminent domain. *Burrows v. Grays Harbor Boom Co.*..... 630
2. **SAME—STATUTES—CONSTRUCTION.** The act of 1895, p. 128, § 4, wherein it is provided that nothing therein shall be construed to authorize a boom company to injure or damage any property, shows the legislative intent that such companies, whether incorporated before or after the act, should have no exclusive right of navigation or authority to obstruct the stream; since the same was, in part, an act to enlarge the power of boom companies theretofore incorporated. *Id.*..... 630

NAVIGABLE WATERS—CONTINUED.

3. SAME—EMINENT DOMAIN. The legislature has no power to confer authority upon a boom company to overflow the land of riparian proprietors or to make any use of or injure the land above the line of ordinary high water, or encroach upon the banks of a navigable river, as the same would be a taking or damaging of property without first making compensation therefor, in violation of Const., art. 1, § 16. *Id.*..... 630
4. SAME. There is no distinction as to the rights of riparian owners to injunction between meandered and nonmeandered streams, as far as the right of boom companies to float logs is concerned. *Id.*.... 630
5. SAME—RIGHT OF BOOM COMPANY TO OBSTRUCT STREAM—NEGLIGENCE. The reasonable care of a boom company in its operations of floating and booming logs does not justify an obstruction of navigation and injury to the lands of a riparian owner, where there is actual invasion of constitutional rights and a permanent taking, use and damaging, by the overflowing of, and lodging of logs, on the land, and the use of the bank as one side of the company's boom, and permanent obstruction of the waterway. *Id.*..... 630
6. NAVIGABLE WATERS—RIPARIAN RIGHTS—STATUTES—DAMNUM ABSQUE INJURIA. The statute authorizing the incorporation of boom companies expressly guarantees the rights of riparian owners when it provides that a boom company shall not interfere with navigation or injure or damage adjacent lands; and in such case there can be no application of the doctrine of *damnum absque injuria*. *Id.*.... 630
7. NAVIGABLE WATERS—OBSTRUCTION AND DAMAGE—INJUNCTION AGAINST—CONSTRUCTION OF DECREE. A permanent injunction against the obstruction of navigation in front of the plaintiffs' premises, is to be construed with reference to the plaintiffs' rights only; and a decree is not objectionable as too broad or practically preventing the doing of business by a boom company, where it enjoins the defendant from obstructing navigation in front of the plaintiffs' lands, from sorting or holding logs against or using the banks of said premises, from operating any boom so as to prevent plaintiffs' use or navigation of the river, or to cause the overflowing of the lands, from causing artificial floods overflowing the lands, and from using plaintiffs' premises as one side of its boom, and requiring it to keep open a waterway 50 feet wide next to said lands. *Id.*..... 630
8. SAME—LOGS AND LOGGING. The statute providing that boom companies shall not interfere with navigation does not require a free passage on both sides of the boom for all boats, inasmuch as the company is given power to condemn lands and rights necessary to operate its business. *Id.*..... 630

NAVIGATION:

See NAVIGABLE WATERS.

NECESSITY:

Condemnation proceedings, agreement with owner as to compensation, see MUNICIPAL CORPORATIONS, 5.

NEGLIGENCE:

See CARRIERS, 2, 3; ELECTRICITY.

Causing death, action for damages, see DEATH.

Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 6.

Evidence to support findings of, see APPEAL AND ERROR, 30.

In operations of boom company, see NAVIGABLE WATERS, 5.

Of city in care of streets, see MUNICIPAL CORPORATIONS, 28, 29.

Of person injured by operation of railroad, see RAILROADS, 1.

Of servant, see MASTER AND SERVANT.

Opinions as to contributory negligence, see EVIDENCE, 1.

1. NEGLIGENCE—COLLAPSE OF BRIDGE—DUTY TO SUPPLY SAFE PLACE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE. Where a paving company uses an old bridge for a dumping place for gravel delivered by teamsters of an independent contractor, it owes the duty to see that that place is reasonably safe, and it cannot be said that a teamster, in hauling his second load onto the bridge, assumed the risk or was guilty of contributory negligence, unless he had knowledge of the dangerous condition of the bridge and of the paving company's failure to discharge its duty. *Curtis v. Barber Asphalt Paving Co.*..... 334
2. NEGLIGENCE—EXPOSED MACHINERY—INJURY TO TRESPASSING CHILDREN. The owner of premises is liable for injuries to trespassing children, sustained by reason of dangerous machinery left unguarded in exposed places near a highway where children are likely to be attracted thereto and injured. *McAllister v. Seattle Brewing & Malting Co.*..... 179
3. SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. The liability of the owner of premises to a trespassing child nine years of age, is for the jury where a pulley or sheave wheel, used to move cars on a spur track with a wire cable and donkey engine, was left exposed and unguarded on defendant's premises (which had been a public street) within twenty-five feet of paths commonly used by the public, and where the child was attracted by the moving cable, and injured by placing his foot on the slowly moving cable, which suddenly started up rapidly, drawing his foot against the pulley. *Id.*..... 179

NEWSPAPERS:

Publication of summons, see TAXATION, 12.

NEW TRIAL:

After waiver of defense and remand, see **APPEAL AND ERROR**, 37.

Assignment of error as to, see **APPEAL AND ERROR**, 17.

On condition of remission of excessive verdict, see **APPEAL AND ERROR**, 33-35.

Power to grant after denial, see **COURTS**, 1.

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CONFLICTING TESTIMONY.** Discretion is involved in the granting of a new trial for newly discovered evidence where the evidence was conflicting or insufficient, and the same will not be disturbed on appeal where no abuse of discretion appears. *Cummings v. Sunich*..... 665
2. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY.** A new trial for newly discovered evidence as to the location of a lost corner is properly denied where such evidence is vague and indefinite. *Strunz v. Hood*..... 99
3. **NEW TRIAL—EXTENDING TIME FOR APPLICATION—POWER OF COURT—EFFECT OF STATUTE.** The statute requiring a judgment to be entered immediately upon return of the verdict, does not change the rule, under the former statute, whereby the court had power to extend the time for moving for a new trial after the time therefor had expired. *McAllister v. Seattle Brewing & Malting Co.*..... 179
4. **NEW TRIAL—DISCRETION OF COURT—MERITORIOUS DEFENSE.** The discretion of the court in denying a continuance will not be interfered with where it appears that there is no defense, legal or equitable, to the action. *Bank of Montreal v. Howard*..... 10

NONRESIDENCE:

Of administrator as fraud, see **EXECUTORS AND ADMINISTRATORS**, 2.

Right of nonresident to vacation of judgment, see **JUDGMENT**, 5.

NONSUIT:

See **DISMISSAL AND NONSUIT**.

In action for personal injuries, see **DAMAGES**, 3.

Statute precluding granting of, see **FORCIBLE ENTRY AND DETAINER**, 5.

NOTICE:

See **LIS PENDENS**.

Law of case as to sufficiency of notice of claim, see **APPEAL AND ERROR**, 38.

Meeting of electors, purchase of building site, see **SCHOOLS AND SCHOOL DISTRICTS**.

Of action or process, see **PROCESS**.

Of amendments to statement of facts, see **APPEAL AND ERROR**, 15.

Of appeal, proof of service, see **APPEAL AND ERROR**, 10.

Of certification of statement of facts, see **APPEAL AND ERROR**, 16.

Of entry of judgment, see **ACTIONS**, 2.

Of misappropriation of special fund, see **MUNICIPAL CORPORATIONS**, 25.

NOTICE—CONTINUED.

- Of motion to vacate, want of as defense, see JUDGMENT, 7.
- Of permanent change of address, see INSURANCE, 1, 2.
- Of premiums due, see INSURANCE, 1, 2.
- Of reappointment of trustee, see APPEAL AND ERROR, 2.
- Of redemption from sale, see EXECUTION, 2.
- On the part of city of defective street, see MUNICIPAL CORPORATIONS, 29.
- Payment of taxes as notice, see MUNICIPAL CORPORATIONS, 20-23.
- Sufficiency of notice of administration, see EXECUTORS AND ADMINISTRATORS, 1, 4.
- To defend action, see COVENANTS.
- To cotenant, forfeiture of agreement to purchase land, see TENANCY IN COMMON, 1.
- To creditors, see EXECUTORS AND ADMINISTRATORS.

OBSTRUCTIONS:

- Of navigable waters, see NAVIGABLE WATERS, 1-8.

OFFICERS:

- See MANDAMUS.
- Authority to contract, see CORPORATIONS, 4.
- Corporate officers, fraud of, see CORPORATIONS, 1-3.
- Power to withhold deed to state lands, see PUBLIC LANDS, 3.
- State officers, authority to fix salary of expert, see STATES, 1.

OPINION EVIDENCE:

- In civil actions, see EVIDENCE, 1, 6, 7.

OPINIONS:

- Harmless error as to, see APPEAL AND ERROR, 27.

OPTION:

- Estoppel to claim fraud on termination of, see BILLS AND NOTES, 1.

ORAL CONTRACTS:

- See FRAUDS, STATUTE OF.

ORDINANCES:

- Condemnation of land by towns, see MUNICIPAL CORPORATIONS, 1-5, 7.
- Speed of automobiles on streets, see MUNICIPAL CORPORATIONS, 26, 27.

OUSTER:

- Cancellation of fraudulent judgment, see ACTION, 1.

PARENT AND CHILD:

- Recovery by parent for death, see DEATH.

1. PARENT AND CHILD—EMANCIPATION. Where a minor ran away from home and enlisted in the army, any manumission depriving his parents of the right to his services is effective only during the time he was engaged in the public service. *Dean v. Oregon R. & Nav. Co.*..... 564

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 4.

PARTIES:

Entitled to allege error, see APPEAL AND ERROR, 37.

Joinder of, in civil actions, see MANDAMUS, 1, 2.

Nonjoinder in foreclosure action as defense, see EJECTMENT.

Persons entitled to enforce specific performance of contract, see SPECIFIC PERFORMANCE, 1.

Persons entitled to mechanics' lien, see MECHANICS' LIENS, 4.

Pledgee as party in interest to amount due on note, see PLEDGES, 2.

1. PARTIES—TRUSTS—ACTIONS—REAL PARTY IN INTEREST—QUIETING TITLE. A person to whom a deed of land is conveyed without consideration, to hold the title for the grantors, is a trustee of an express trust, within Bal. Code, § 4825, and may sue to quiet title without joining the real owners. *Carr v. Cohn*..... 586

PARTNERSHIP:

1. PARTNERSHIP—BILLS AND NOTES—EXECUTION—EVIDENCE—SUFFICIENCY. In an action upon a promissory note given by a partnership in aid of the construction of a battleship, in which the testimony of the two partners conflicts as to the authority of one of them to execute the note, the burden of proof upon the plaintiff is sustained where it appears that the construction company was one of the firm's best customers, that the objecting partner was notified that a note had been executed therefor by the other in his absence, and made no objection, and the partner signing the note had no interest in making the subscription individually. *Moran Bros. Co. v. Watson*..... 392
2. SAME—BOOKS OF ACCOUNT—EVIDENCE—ADMISSIBILITY. In such a case, it is not error to exclude evidence of the copartnership books of account, it being immaterial whether the note was entered thereon in case it had been ratified. *Id.*..... 392
3. SAME—JUDGMENT—ENTRY AGAINST ONE MEMBER OF FIRM—SERVICE OF PROCESS. One partner cannot complain that judgment for a partnership debt was entered against him alone, where he was the only partner served, knew that his copartner had not appeared, and that judgment would be taken against him alone, and made no motion for a new trial. *Id.*..... 392

PART PAYMENT:

See VENDOR AND PURCHASER, 4.

PATENTS:

For public lands, see PUBLIC LANDS.

PAYMENT:

- Mistake as to time, bonds for local improvement, see MUNICIPAL CORPORATIONS, 18.
- Of city warrants out of order, wrongful diversion, see MUNICIPAL CORPORATIONS, 24, 25.
- Of poll tax, see TAXATION, 4.
- Of premiums, see INSURANCE, 1, 3.
- Of purchase price by joint purchaser, right to forfeiture, see TENANCY IN COMMON.
- Of taxes by holder of certificate of sale as notice, see MUNICIPAL CORPORATIONS, 20-23.
- Substitution of new debt on payment of note, see MORTGAGES.

PENALTIES:

- Violation of liquor laws, see INTOXICATING LIQUORS.

PENDENCY OF ACTION:

- Effect as to property involved, see LIS PENDENS.

PERFORMANCE:

- Of contract, see MINES AND MINERALS.
- Of contract for local improvement, see MUNICIPAL CORPORATIONS, 8.
- Of contract for sale of lands, see VENDOR AND PURCHASER, 4.
- Of subsidy agreement, see SUBSCRIPTIONS.

PERSONAL INJURIES:

- See NEGLIGENCE, 1-3.
- Caused by electricity, see ELECTRICITY.
- Excessive damages, see DAMAGES, 5, 6.
- Harmless error in admission of evidence, see APPEAL AND ERROR, 27-30; in argument to jury, see TRIAL, 10.
- To employee, see MASTER AND SERVANT.
- To passenger, see CARRIERS, 2, 3.
- To person on or near railroad tracks, see RAILROADS, 1.
- To traveler on street or highway, see MUNICIPAL CORPORATIONS, 28, 29.

PERSONAL PROPERTY:

- See PLEDGES.
- Conversion of, see TROVER AND CONVERSION.
- Recovery of, see REPLEVIN.

PETITION:

- For condemnation of land, see MUNICIPAL CORPORATIONS, 1, 4.

PHYSICAL EXAMINATION:

- Of person injured, evidence of fees paid, see DAMAGES, 4.

PHYSICIANS AND SURGEONS:

As experts, see EVIDENCE, 6, 7.

Exercise of reasonable care in securing treatment from, see DAMAGES, 2.

Services in personal injury case, proof of fees paid, see DAMAGES, 4.

PLATS:

Effect as showing dedication, see DEDICATION, 1.

PLEADING:

See ADVERSE POSSESSION, 4.

Amendment, see REMOVAL OF CAUSES.

Complaint, see REFORMATION OF INSTRUMENTS.

Complaint in action to quiet title, see QUIETING TITLE.

Complaint in foreclosure actions, see TAXATION, 13.

Exception to amendment, see APPEAL AND ERROR, 5.

Harmless error in amendments, see APPEAL AND ERROR, 23.

Harmless error in overruling demurrer, see APPEAL AND ERROR, 25.

Joinder of causes, see ACTION, 1.

Laws of foreign state, presumption, see STATUTES, 1.

To set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, 2.

To show conclusiveness of former judgment, see COVENANTS.

1. PLEADING—VARIANCE. An allegation that the defendant accepted the work is sufficient to admit proof that the same was done to the satisfaction of defendant's engineer as required by written contract. *Lang v. Crescent Coal Co.*..... 267
2. PLEADING—ANSWER—DEMURRER. The overruling of a demurrer to an answer is not error when the demurrer is practically a denial of all the averments of the complaint. *Schell v. Walla Walla*..... 43

PLEDGES:

Necessity to show tender kept good to redeem pledge, see APPEAL AND ERROR, 31.

1. PLEDGES—VALIDITY—MUTUALITY. The pawning of a ring for \$50, under an agreement that after one year it might be redeemed on the payment of \$75, is not unilateral by reason of the indefiniteness as to the time for redemption; and upon tender within a reasonable time, the pledgor is entitled to possession. *Andrews v. Uncle Joe Diamond Broker*..... 663
2. PLEDGES—NOTE HELD AS COLLATERAL—ENFORCEMENT—AMOUNT OF RECOVERY. In an action upon a note of \$3,363, held as security for a note of \$3,000, the pledgee is not a party in interest beyond the amount due on the latter note, and judgment for the amount of the former note is erroneous. *Bank of Montreal v. Howard*..... 10

POLICY:

Of insurance, see INSURANCE.

POLL TAX:

See TAXATION, 3, 4.

POSSESSION:

Character of to establish title, see ADVERSE POSSESSION, 1, 2.

Of community property as defense in action of forcible entry and detainer, see HUSBAND AND WIFE, 2.

PRACTICE:

See APPEAL AND ERROR; APPEARANCE; CONTINUANCE; COSTS; DAMAGES; DEPOSITS IN COURT; DISCOVERY; DIVORCE; EVIDENCE; EXECUTION; MANDAMUS; NEW TRIAL; PLEADING; PROCESS; REMOVAL OF CAUSES; TRIAL.

Condemnation proceedings, see EMINENT DOMAIN.

Revival of judgment, see JUDGMENT, 17.

PREFERENCES:

Of creditors by failing debtor, see FRAUDULENT CONVEYANCES, 2.

PREJUDICE:

At trial, see TRIAL, 7-10.

Improper cross-examination, see CRIMINAL LAW, 17.

PREMIUMS:

Notice of premiums due, see INSURANCE, 1, 2.

PRESCRIPTION:

Acquisition of rights, see ADVERSE POSSESSION.

PRESENTMENT:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.

PRESUMPTIONS:

As to continuance of contracts, see CONTRACTS, 1.

As to laws of foreign state, see STATES, 1.

Record on appeal, failure to answer interrogatories, see APPEAL AND ERROR, 13.

Service of process by publication, see TAXATION, 11.

PRINCIPAL AND AGENT:

See BROKERS.

Construction of agreement between, see CONTRACTS, 1.

Corporate agents, see CORPORATIONS, 4.

PRINCIPAL AND AGENT—CONTINUED.

1. **PRINCIPAL AND AGENT—AGENCY—BUYING IN DELINQUENT PROPERTY AT TAX SALE—REFUSAL TO CONVEY TO PRINCIPAL.** A lessor and neighbor of the owner of property, who bids the same in at tax sale, acts as agent for the owner and is bound to reconvey upon tender of the taxes, where it appears that, after the owner's removal to Alaska, such lessor, who was delinquent in rent, upon the owner's request went to the county seat to investigate the taxes at different times, reported that they were delinquent, and later that the premises were about to be sold, and that he would attend the sale and bid in the property if the price was not too high, and that he bid in the property without notifying the owner that he was acting for himself. *Frost v. Perfield*..... 185

PROCESS:

See PARTNERSHIP.

Effect of appearance, see APPEARANCE.

In tax foreclosure cases, summons, see TAXATION, 10-12, 14-16.

Notice to owners by holder of certificate of sale, see MUNICIPAL CORPORATIONS, 21.

Recitals as to due service, conclusiveness, see JUDGMENT, 3.

1. **PROCESS—SUMMONS—PROOF OF SERVICE—AFFIDAVIT—SUFFICIENCY.** Proof of service of summons by affidavit must show that the person making the service was twenty-one years of age at the time the service was made, and proof that he was of age when the affidavit was made is insufficient. *French v. Ajax Oil & Development Co.* 305

PROHIBITION:

To review action of city council in revoking liquor license, see INTOXICATING LIQUORS, 2.

PROMISE OF MARRIAGE:

See BREACH OF MARRIAGE PROMISE.

PROOF:

Of loss insured against, see INSURANCE, 5.

Of service of process, see PROCESS; TAXATION, 11, 12.

Variance, see PLEADING, 1.

PROPERTY:

Adverse possession, see ADVERSE POSSESSION.

Community property, see HUSBAND AND WIFE.

Conveyance of homestead as fraud on creditors, see FRAUDULENT CONVEYANCES, 4.

Dedication to public use, see DEDICATION.

Division of, see DIVORCE, 1, 3.

Nature of for purposes of taxation, see TAXATION, 2.

Of wife, liability for husband's debts, see HUSBAND AND WIFE, 1.

Subject to replevin, see REPLEVIN.

Taking or damaging for public use, see EMINENT DOMAIN.

PROXIMATE CAUSE:

Of injury, see DAMAGES, 3.

PUBLICATION:

Of summons, see TAXATION, 11, 12, 14, 15.

PUBLIC DEBT:

Creation under illegal incorporation, ratification, see MUNICIPAL CORPORATIONS, 14, 15, 17.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS.

Establishment of drainage district, waiver of damages, see DRAINS, 1-6.

PUBLIC LANDS:

Taxation, see TAXATION, 1, 2.

1. PUBLIC LANDS—RIGHTS OF SETTLER BEFORE PATENT—WATERS AND WATER COURSES — APPROPRIATION — IRRIGATING CANAL — INJUNCTION. United States Rev. Stats., §§ 2339 and 2340, recognizing the right to appropriate water according to local customs, subject to the payment of damages to settlers on the public domain, and declaring that patents shall issue subject to vested or accrued water rights, does not confer the right upon an irrigation company to dig a canal across the lands of a settler after the initiation of his homestead entry, or confine the settler to an action for damages after issuance of the patent, but injunction lies to prevent the use of such canal unless a right of way be condemned by the irrigation company. *Atkinson v. Washington Irrigation Co.*..... 75
2. SAME—ESTOPPEL—SUFFERING CONSTRUCTION OF CANAL. The fact that a settler on the public domain suffers an irrigation company to dig a canal across the land after the initiation of his homestead entry, will not estop him from enjoining the use of the canal after the issuance of the patent from the government. *Atkinson v. Washington Irrigation Co.*..... 75
3. PUBLIC LANDS—SALES—DEED—DELIVERY—FRAUD—POWER OF COMMISSIONER TO WITHHOLD DEED. The commissioner of public lands or board of land commissioners, has the power to withhold from delivery a deed of state lands after confirmation of the sale and execution of the deed, and to direct an investigation, where it is alleged that the same has been procured by fraud, misrepresentation or collusion. *State ex rel. Shores v. Ross.*..... 246

PUBLIC POLICY:

Avoiding contract, see BREACH OF MARRIAGE PROMISE, 1.

PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

- Dedication of property, see **DEDICATION**.
- Right of way, adoption of location, see **RAILROADS**, 2.
- Taking property for public use, see **EMINENT DOMAIN**.

PUNISHMENT:

- Excessive sentence, see **CRIMINAL LAW**, 19.

PURCHASERS:

- At foreclosure sale, effect of *lis pendens*, see **LIS PENDENS**.
- Of property at tax sale, see **PRINCIPAL AND AGENT**.

QUALIFICATIONS:

- Of administrator, see **EXECUTORS AND ADMINISTRATORS**, 2.

QUESTIONS FOR JURY:

- See **CARRIERS**, 2; **MASTER AND SERVANT**, 6, 13; **NEGLIGENCE**, 3; **SUBSCRIPTIONS**, 1.
- Ascertainment of injury, when proper test, see **EVIDENCE**, 6.
- Construction of contract, see **CONTRACTS**, 1.

QUIETING TITLE:

- See **ADVERSE POSSESSION**, 4; **TENANCY IN COMMON**, 2.
- Acceptance of deed to part of premises, effect, see **ESTOPPEL**.
- Bar of action, see **LIMITATION OF ACTIONS**.
- Bar of judgment, see **JUDGMENT**, 1.
- Capacity of trustee to sue in own name, see **PARTIES**, 1.

1. **QUIETING TITLE—LIEN FOR MONEY PAID ON EXECUTION SALE—ELECTION OF REMEDIES.** One who alleges a fraudulent redemption from execution sale, and seeks to quiet title by cancellation of the sheriff's deed issued on redemption, has elected his remedy, and cannot claim that the complaint entitled him to a lien on the premises for money paid on the execution sale; his remedy therefor being against the sheriff. *Carroll v. Hill Tract Improvement Co.*..... 569

RAILROADS:

- Action for death of minor, see **DEATH**, 2, 3.
- Appropriation of property, subscription to stock as statutory requisite, see **EMINENT DOMAIN**, 2.
- As employers, negligence, see **MASTER AND SERVANT**, 3.
- Carriage of goods and passengers, see **CARRIERS**.
- Fixing of salary of expert employed by railway commission, see **STATES**, 1.
- Institution of condemnation proceedings as affecting vendor's title, see **VENDOR AND PURCHASER**, 1.
- Subsidy agreement for construction of, see **SUBSCRIPTIONS**.

RAILROADS—CONTINUED.

1. RAILROADS—DEATH AT CROSSING—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN—DUTY TO LOOK AND LISTEN. A railroad employee familiar with the locality, and experienced in the management of cars there, who was run down and killed by the backing of a logging train at a city street crossing, is guilty of contributory negligence, as a matter of law, where it appears that the place was a network of seven or eight tracks, being the intersection of two railroads, that at the time two or three engines were coming from the roundhouse of one company, ringing bells and blowing off steam, and that the deceased, with his attention on the engines in view, undertook to cross the tracks diagonally without stopping to look back or listen for the train coming from behind on the tracks of the other company; the doctrine that one must look and listen applying to city street crossings, and particularly to places of such great danger as the crossing in question. *Baker v. Tacoma Eastern R. Co.*..... 575
2. RAILROADS—LOCATION OF LINE—CORPORATIONS—EXTRA-TERRITORIAL ACTS—ADOPTION. Where a domestic railway corporation adopted its line of location at a meeting of the directors held in another state, the subsequent bringing of condemnation proceedings in this state for a right of way along the same line amounts to an adoption of the corporate action taken outside of the state. *State ex rel. Biddle v. Superior Court*..... 108

RAPE:

- Conduct of prosecutrix, admissibility, see CRIMINAL LAW, 10.
 Evidence of, see CRIMINAL LAW, 14, 18, 19, 21, 26.
 Excessive sentence, see CRIMINAL LAW, 19.
 Instructions as to corroboration, see CRIMINAL LAW, 15.

RATIFICATION:

- Of act of attorney, see ATTORNEY AND CLIENT, 1.
 Of acts of corporate officers, see CORPORATIONS, 4.
 Of acts of partner, see PARTNERSHIP, 2.
 Of debt created under invalid incorporation, see MUNICIPAL CORPORATIONS, 14, 15, 17.
 Of unauthorized acts of corporation, see CORPORATIONS, 4.

REAL ACTIONS:

- See EJECTMENT; FORCIBLE ENTRY AND DETAINER.
 Acceptance of deed as defense in action to quiet title, see ESTOPPEL.
 Establishment of lost corner, see JUDGMENT, 6.

REAL ESTATE AGENTS:

- See BROKERS.

REAL PROPERTY:

See **VENDOR AND PURCHASER.**

Acceptance of deed as defense in action to quiet title, see **ESTOPPEL.**

Actions, limitation, see **LIMITATION OF ACTIONS, 1, 5.**

Agreement for sale of, see **FRAUDS, STATUTE OF.**

Agreement to sell, oral evidence of contract, see **EVIDENCE, 4.**

Community interest in, evidence of, see **EXECUTION, 2.**

Conveyance of insured property, see **INSURANCE, 6.**

Conveyance of homestead as fraud on creditors, see **FRAUDULENT CONVEYANCES, 4.**

Designation for purpose of taxation, see **TAXATION, 2.**

Division of, propriety, see **DIVORCE, 1.**

Liability of wife's separate property on husband's note executed in foreign state, see **HUSBAND AND WIFE, 1.**

Purchaser of delinquent property as agent of owner, see **PRINCIPAL AND AGENT.**

Recovery of, proof of title, see **EJECTMENT.**

Sale of homestead, exemption of proceeds, see **EXEMPTION.**

Trial of title, see **FORCIBLE ENTRY AND DETAINER.**

RECEIPTS:

Oral evidence consistent with, admissibility, see **EVIDENCE, 4.**

RECEIVERS:

1. **RECEIVERS—APPOINTMENT—WANT OF JURISDICTION.** The appointment of a receiver based upon a judgment entered without jurisdiction is also without jurisdiction. *French v. Ajax Oil & Development Co.*..... 305

RECITALS:

In tax deeds, see **TAXATION, 5.**

RECORDS:

Copy of marriage certificate as evidence, see **EVIDENCE, 1.**

Duty to investigate, action for wrongful diversion of funds, see **MUNICIPAL CORPORATIONS, 24.**

On appeal, see **APPEAL AND ERROR, 15, 16.**

REDEMPTION:

Notice of in foreclosure sale, see **EXECUTION, 2.**

Of property pledged, see **PLEDGES, 1.**

Payment of taxes during period of, see **MUNICIPAL CORPORATIONS, 20-23.**

Period of in absence of notice to owner, see **MUNICIPAL CORPORATIONS, 23.**

REDUCTION:

Of verdict on appeal, see **DAMAGES, 5, 6.**

REFORMATION OF INSTRUMENTS:

Joinder of causes, see ACTION, 1.

1. **REFORMATION—ABSOLUTE DEED AS MORTGAGE—MORTGAGEE IN POSSESSION—TENDER OF DEBT—PLEADING.** The complaint in an action against parties in possession to reform an absolute deed as a mortgage need not allege tender of the debt due, where the defendants obtained possession by fraud, and under the terms of the mortgage deed, the plaintiffs were given the right to possession. *Gustin v. Crockett* 536

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 31-32.

REMISSION:

Of excessive verdict, see APPEAL AND ERROR, 33-35.

REMOVAL OF CAUSES:

1. **REMOVAL OF CAUSES—ACTION FOR DAMAGES—JURISDICTION—AMOUNT CLAIMED.** In an action for damages the amount claimed in the complaint is the value in dispute, for the purposes of removal to the United States court; and it is not an abuse of discretion to allow an amendment to bring the allegations within the amount claimed in the complaint. *Stark v. Port Blakely Mill Co.*..... 309

REPLEVIN:

Judgment as bar to action of, see JUDGMENT, 2.

1. **REPLEVIN—WHEN LIES—CONDITIONAL BILL OF SALE—BREACH.** Where, upon the breach of a conditional bill of sale of a stock of goods and fixtures, the vendor takes possession of additional stock purchased since the bill of sale, replevin lies to recover such additional stock. *Hennig v. Claussen Brewing Association*..... 116

RESCISSION:

Of contract for sale of land, see VENDOR AND PURCHASER, 2.

RES JUDICATA:

See JUDGMENT, 1, 2.

Decision on former appeal, see APPEAL AND ERROR, 38.

RESOLUTIONS:

Condemnation of land by towns, see MUNICIPAL CORPORATIONS, 1-5, 7.

REVIEW:

See APPEAL AND ERROR; EMINENT DOMAIN; MANDAMUS.

Of action of city council in revoking liquor license, see INTOXICATING LIQUORS.

REVIVAL:

Of judgment, see JUDGMENT, 16-18.

REVOCATION:

Of liquor license, see **INTOXICATING LIQUORS**.

RIPARIAN OWNERS:

Obstruction of navigable stream, see **NAVIGABLE WATERS**, 1-8.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 1, 2.

Assumption of by collapse of bridge, see **NEGLIGENCE**, 1.

Change of, effect, see **INSURANCE**, 4.

ROBBERY:

See **CRIMINAL LAW**, 1, 6-9, 14.

SALES:

Breach of conditional sale, see **REPLEVIN**.

Conditions of policy, see **INSURANCE**, 6.

Conveyance of estate indebted by void mortgage, see **WILLS**.

For taxes, see **TAXATION**.

Of assets of corporation, see **CORPORATIONS**, 1-3.

Of goods in bulk, see **FRAUDULENT CONVEYANCES**, 3.

Of homestead, exemption of proceeds, see **EXEMPTION**.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

Of realty, see **VENDOR AND PURCHASER**.

Of realty, award of tender in action for purchase money, see **DEPOSIT IN COURT**.

On execution, see **EXECUTION**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

SATISFACTION:

Of mortgage and substitution of new debt, see **MORTGAGES**.

SCHOOLS AND SCHOOL DISTRICTS:

Assessment of school property for local improvements, see **MUNICIPAL CORPORATIONS**, 10, 11.

Construction of school laws, see **STATUTES**, 3.

1. **SCHOOLS AND SCHOOL DISTRICTS—BUILDING SITE—MEETING OF ELECTORS—NOTICE—SUFFICIENCY.** The notice of a meeting of the voters of a school district to decide upon the selection of a school building site and authorize its purchase need not state the hours at which polls will be opened, as voting by ballot is not required, and a notice fixing the time of the meeting at one o'clock p. m. is sufficient. *Regan v. School District No. 25*..... 523

SEALS:

Validity of deed in absence of, see **TAXATION**, 7, 8.

SEDUCTION:

Improper cross-examination at trial, see **CRIMINAL LAW**, 17.

SELF-SERVING DECLARATIONS:

See DEATH, 1.

SENTENCE:

In criminal prosecutions, see CRIMINAL LAW, 19.

SEPARATE PROPERTY:

Of wife, liability for husband's debts, see HUSBAND AND WIFE, 1.

SERVICE:

Loss of services of minor by enlistment in army, see PARENT AND CHILD.

Of process, see PROCESS; TAXATION, 11, 12, 14, 15.

SETTLEMENT:

Of case on appeal, see APPEAL AND ERROR, 15, 16.

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On unsurveyed land, rights before patent, see PUBLIC LANDS, 1, 2.

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Construction of, as adverse claim, see ADVERSE POSSESSION, 2.

Injuries from defects, see MUNICIPAL CORPORATIONS, 28, 29.

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Of administrator, validity when affixed by attorney, see EXECUTORS AND ADMINISTRATORS, 1.

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See APPEARANCE, 1, 2.

SPECIFIC PERFORMANCE:

See VENDOR AND PURCHASER, 4.

Memorandum agreement, sale of real estate, see FRAUDS, STATUTE OF, 2.

1. SPECIFIC PERFORMANCE—TO COMPEL SUBLEASE—LEASE TAKEN IN NAME OF THIRD PERSON—REAL PARTIES IN INTEREST. An agreement, as part consideration for the sale of a stock of goods, that the defendants would obtain an extension of their lease of a storeroom then in their possession, and that they would sublease one-half of the room to the plaintiffs for the term of the renewal, will be enforced, and it is not ground for denying specific performance that the court had no jurisdiction over the defendant's son, a nonresident, in whose name the renewal was taken, and who, at their request, held the lease in his name as their agent; it appearing from the evidence that the son had no interest in the lease or leased property, that the defendants retained and occupied the premises and paid the rent, and were the only real parties in interest. *Capps v. Fred-erick*..... 38

SPECIFIC PERFORMANCE—CONTINUED.

2. SPECIFIC PERFORMANCE—DECREE—OBJECTIONS. It cannot be objected to a decree for the conveyance of all of defendant's interest in certain lots, that some of the lots had, by the defendant, been previously contracted to be sold to other persons not parties to the suit; as such interests are not affected by the decree. *Peirce v. Wheeler*..... 326

STATE LANDS:

See PUBLIC LANDS.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 14-16.

STATES:

- Land leased from state, assessment for benefits, see MUNICIPAL CORPORATIONS, 9.
- Laws of foreign state, construction, see STATUTES, 1.
- Power to tax property leased from state, see TAXATION, 1, 2.
- Public lands, see PUBLIC LANDS.
- Trial of issue of fraud in securing state deed, see APPEAL AND ERROR, 37.
1. STATES—CONTRACT OF EMPLOYMENT—AUTHORITY OF RAILWAY COMMISSION—COMPENSATION OF EXPERT. Under Laws 1905, p. 145, §§ 2 and 12, authorizing the railway commission "to employ" experts, the commission has power to fix their salary and the same cannot be questioned by the state auditor as excessive, in the absence of fraud. *State ex rel. Gillette v. Clausen*..... 437
2. STATE AUDITOR—CLAIMS AGAINST STATE—AUDITING OF. Under Bal. Code, §§ 134 and 147, which provide for the auditing of all claims against the state by the state auditor, except such as are expressly authorized by law to be audited and settled by other officers, the auditor exercises no judgment and discretion but only acts in a ministerial capacity in auditing the claim of an expert authorized by law to be employed by the state railway commission, although the commission is not authorized to "audit" the claim. *Id.*..... 437

STATUTES:

See EXEMPTIONS; MECHANICS' LIENS; NEW TRIAL, 3.

Amendment and construction, see FORCIBLE ENTRY AND DETAINER.

Amendment, employment of broker, see FRAUDS, STATUTE OF, 1.

Authorizing right of eminent domain, see MUNICIPAL CORPORATIONS, 3.

Boom companies, obstruction of stream, see NAVIGABLE WATERS, 1, 2, 6.

Bulk stock laws, see FRAUDULENT CONVEYANCES, 3.

Collection of poll tax, construction, see TAXATION, 4.

Construction of "shall" when not mandatory, see JUDGMENT, 19.

Curative acts, see TAXATION, 8.

STATUTES—CONTINUED.

- Entry of default judgment, failure to answer interrogatories, see JUDGMENT, 15.
- Injury to irrigation dam, construction, see CRIMINAL LAW, 2, 4.
- Local improvements, assessments for benefits, see MUNICIPAL CORPORATIONS, 10-13.
- Municipal assessments, foreclosure, see MUNICIPAL CORPORATIONS, 19-21.
- Of foreign state as affecting liability of wife's separate estate, see HUSBAND AND WIFE, 1.
- Provisions relating to assessment and collection of taxes, construction, see TAXATION, 9.
- Revival of judgment, change of remedy, see JUDGMENT, 16-18.
- Speed of automobiles on streets, see MUNICIPAL CORPORATIONS, 26, 27.
- 1. STATUTES—FOREIGN LAWS—PLEADING—PRESUMPTIONS. Where the statutes of a state are not pleaded they are presumed to be the same as the laws of this state. *Mantle v. Dabney*..... 193
- 2. STATUTES—AMENDMENT—CONDEMNATION BY TOWNS. Laws 1893, p. 135, providing the procedure for condemnation by towns is not unconstitutional by reason of its failure to set out the superseded statute as amended thereby, as it is not an amendment thereof, but an independent act; and towns accordingly have power to condemn pursuant thereto. *State ex rel. Jones v. Superior Court*..... 476
- 3. STATUTES—CONSTRUCTION. The construction placed upon a statute by the department of education, long acquiesced in, should be given weight in its interpretation. *Regan v. School District No. 25*.. 523

STIPULATIONS:

- As to perfecting appeal, see APPEAL AND ERROR, 9.

STOCK:

- Corporate stock, see CORPORATIONS, 5.
- Subscription to as condition precedent, see EMINENT DOMAIN, 2, 3.

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- Of corporations, see CORPORATIONS, 5.

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- See WAREHOUSEMEN.

STREET RAILROADS:

- Carriage of passengers, see CARRIERS.
- Liability to servants for negligence, see MASTER AND SERVANT, 7, 14.

STREETS:

- Dedication to public use, see DEDICATION.
- Improvements, assessments, wrongful diversion, liens, see MUNICIPAL CORPORATIONS, 24, 25.
- Limit of speed of automobiles on, see MUNICIPAL CORPORATIONS, 26, 27.

SUBSCRIPTIONS:

To battleship fund, authority of partner to execute note, see **PARTNERSHIP**, 1.

To stock of corporation as condition precedent, see **EMINENT DOMAIN**, 2, 3.

1. **SUBSCRIPTIONS—CONSTRUCTION OF RAILROAD—CONDITIONS AS TO TERMINUS—PERFORMANCE—QUESTION FOR JURY.** In an action upon a subsidy agreement for the construction of a railroad to begin "at or near W. Junction" it is for the jury to say whether the contract was performed by beginning the railroad at H. Junction, about one mile from W. Junction, considering all the circumstances with due regard to the general direction, location, and length of the road. *Hunt v. Upton*..... 124
2. **SAME—CONSTRUCTION OF CONTRACT—LOCATION OF MAIN LINE.** A subsidy agreement for the construction of a railroad from W. Junction to W. via Eureka Flat, "said road to extend to the head of Eureka Flat," is properly construed to authorize a main line between the specified termini via the locality known as Eureka Flat, with a branch line to the head of Eureka Flat, where it appears that, to require the main line to run to the head of Eureka Flat, would in effect make the main line two sides of a triangle enclosing an acute angle. *Id.*..... 124
3. **SAME—PERFORMANCE OF INDIVIDUAL—INCORPORATION OF COMPANY.** A subsidy agreement for the construction of a railroad by an individual is complied with by him where the contract was completed by a railroad corporation which he incorporated for the purpose of obtaining a right of way, and of which he held substantially all the capital stock. *Id.*..... 124
4. **SUBSCRIPTIONS—CONSTRUCTION—SUBSTANTIAL PERFORMANCE.** A subsidy agreement between individuals in aid of the construction of a railroad is not to be strictly construed, and a substantial performance of the contract is sufficient. *Id.*..... 124

SUBSTITUTION:

Deed as security for new debt, execution by wife, see **MORTGAGES**.

SUMMONS:

See **PROCESS**.

In tax foreclosure, see **TAXATION**, 10-12, 14-16.

SUPERSEDEAS:

Injunction pending, appeal and supersedeas, see **COURTS**, 2.

SUPPORT:

Division of property, for support of wife, see **DIVORCE**, 1, 3.

Of parent, see **PARENT AND CHILD**.

SURVEYS:

See BOUNDARIES, 1.

TAXATION:

Action to cancel deed, see QUIETING TITLE.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 9-15.

Payment of taxes as notice, see MUNICIPAL CORPORATIONS, 20-23.

Payment of taxes to sustain adverse possession, see ADVERSE POSSESSION, 3.

1. - TAXATION—LEASE OF TIDE LANDS FROM STATE—RIGHT TO TAX. A leasehold interest in tide lands, under lease from the state, is subject to taxation. *Moeller v. Gormley*..... 465
2. SAME—ASSESSMENT—REAL OR PERSONAL PROPERTY. A leasehold interest in state tide lands is assessable for taxation as real, and not as personal property, although the present revenue law may be inadequate to enforce its collection when so assessed. *Moeller v. Gormley*..... 465
3. TAXATION—POLL TAX—UNIFORMITY—CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO LEVY. A poll tax may be restricted to males over twenty-one years of age and under fifty, since the state constitution does not require uniformity therein, but the same may be by appropriate classification; and the above is not unreasonable or unjust. *Thurston County v. Tenino Stone Quarries*..... 351
4. SAME—PROCEEDINGS TO COLLECT—CONSTITUTIONAL LAW—TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW—STATUTES—CONSTRUCTION. The provision in the poll tax law requiring an employer to ascertain the names and pay the poll tax of all his employees subject thereto, under penalty of fine or imprisonment, is not a taking of his property without due process of law in that it compels the payment without giving him or his employee his day in court, in view of Bal. Code, p. 223, § 4, and Bal. Code, §§ 4843-4845, providing for the institution of civil actions to collect the tax, wherein the employer may deposit the same in court, without incurring expense or liability for costs, and the employee can have his day in court. *Thurston County v. Tenino Stone Quarries*..... 351
5. TAXATION—TAX DEED—VALIDITY—DESCRIPTION OF PROPERTY—ESTOPPEL OF OWNER. A tax deed of property in a "reserved" portion of a city plat, describing the same as blocks 352 and 372 in such plat, is sufficient, although there are no such blocks designated in the plat, where it appears that, adopting the conservative numbering in the plat, the "reserved" portion would have been blocks 352 and 372, and where the owner had paid no taxes on the "reserved" portion, disputed the county's right to assess the same at all, and stood by in silence after the assessment and foreclosure and permitted sale to be made thereof under such description. *Ontario Land Co. v. Yordy*..... 239

TAXATION—CONTINUED.

6. SAME—TAX JUDGMENT—VACATION—TENDER OF TAX. The validity of tax foreclosure proceedings cannot be attacked by the owner without tender of the delinquent taxes. *Id.*..... 239
7. TAXATION—TAX DEED—VALIDITY IN ABSENCE OF SEAL OF COUNTY TREASURER—EVIDENCE—ADMISSIBILITY. The failure of the legislature to provide an official seal for county treasurers does not invalidate a tax deed executed to a purchaser under the provisions of § 103 of the Revenue Act of 1897 as amended by § 18 of the act of 1899, providing that on the sale of lands for taxes the county treasurer shall execute to the purchaser a tax deed, and such deed made by him, under the official seal of his office, shall be recorded in the same manner as other conveyances; since the requirement of a seal should be construed as surplusage and not mandatory, nor is such a deed inadmissible as *prima facie* evidence in any controversy or suit in relation to the right of the purchaser, his heirs or assigns, to the real estate conveyed, as provided by Laws 1897, p. 190, § 14. *Spokane Terminal Co. v. Stanford*..... 45
8. SAME—CURATIVE ACTS. The legislature has power, after the execution by a county treasurer of a tax deed, to cure any defect by reason of the fact that at the date of its execution there was no statute providing for the official seal of the treasurer required by the law to be used in executing the deed. *Id.*..... 45
9. TAXATION—STATUTORY PROVISIONS—CONSTRUCTIONS. The old rule of strict construction of statutes relating to the assessment and collection of taxes is modified, and they should receive a fair construction to effect their purpose. *Id.*..... 45
10. TAXATION—FORECLOSURE—SUMMONS. A summons for publication in a tax foreclosure proceeding which clearly states the time for appearance, nature and purpose of the action, and complies with the statute in all particulars except to omit the alternative demand that defendants appear "or pay the amount due," is sufficient to confer jurisdiction to enter a default judgment. *Callison v. Smith*.... 202
11. TAXATION—FORECLOSURE—PUBLICATION OF SUMMONS. Upon the publication of a tax foreclosure summons, proof made by a man of the same name as plaintiff will not be presumed to be made by the plaintiff, especially when to do so would question the jurisdiction of the trial court. *Id.*..... 202
12. SAME. A summons for publication in a tax foreclosure may be published in a paper owned by the plaintiff, and proof of publication made by the plaintiff as owner of the paper would not be void. *Id.*..... 202
13. TAXATION—FORECLOSURE OF COUNTY CERTIFICATES—COMMENCEMENT OF ACTION—STATUTES—CONSTRUCTION. No complaint is required for the foreclosure of a county general tax certificate, and under Pierce's Code, § 8694, the proceeding is instituted by filing the certificate with the clerk. *Chehalis County v. France*..... 282

TAXATION—CONTINUED.

14. **SAME—PROCESS—SERVICE BY PUBLICATION—TIME FOR SERVICE.** Under Pierce's Code, § 8691, service by publication in a county tax foreclosure need not be commenced within ninety days from the commencement of the action, as in other civil actions. *Chehalis County v. France*..... 282
15. **SAME—SUMMONS FOR PUBLICATION—SUFFICIENCY.** A summons for publication in a county tax foreclosure is not insufficient for informality in describing the plaintiff in the caption when properly described in the body of the summons. *Id.*..... 282
16. **SAME—JUDGMENT—AMOUNT OF TAX.** The fact that a tax judgment against real property includes \$2.40 personal taxes, not lawfully assessed on the real estate, will not invalidate a judgment where the defendants were legally served and failed to appear and contest the matter in the foreclosure action. *Callison v. Smith*..... 202
17. **TAXATION.** Parties claiming adversely may strengthen their titles by obtaining a tax or street assessment deed. *Wright v. Jessup*..... 618

TENANCY IN COMMON:

1. **TENANCY IN COMMON—CONTRACT TO PURCHASE LAND—EXPIRATION OF TIME LIMIT—FORFEITURE—NOTICE TO COTENANT.** Where two parties enter into an agreement to purchase certain land, each to furnish one-half of the purchase price, their rights must be determined under the rules relating to joint owners or tenants in common; and one party cannot, upon failure of the other to furnish his part of the purchase price within the required time, demand payment and declare a forfeiture and claim full title upon paying the whole sum due on the unpaid purchase price. *Anderson v. Snowden*..... 274
2. **SAME—QUIETING TITLE—TENDER OF AMOUNT DUE—ACTION AGAINST COTENANT.** In such a case the party in default is not entitled to a decree quieting title and declaring him to be the owner of a one-half interest, without first tendering his share of the purchase price, for which sum the other party has a lien upon the land. *Id.*..... 274

TENDER:

See DEPOSITS IN COURT.

Acceptance as waiver of appearance, see APPEAL AND ERROR, 3.

Necessity to show that tender was kept good, see APPEAL AND ERROR, 31.

Of charges, necessity, see CARRIERS, 1.

Of debt in action to reform deed, pleading, see REFORMATION OF INSTRUMENTS.

Of purchase price by joint purchaser, see TENANCY IN COMMON, 2.

Of purchase price, see VENDOR AND PURCHASER, 4.

Of tax for vacation of tax sale, see TAXATION, 6.

Upon redemption of pledged property, see PLEDGES, 1.

TESTAMENTARY CAPACITY:

See WILLS, 1.

TIDE LANDS:

Taxation of leasehold interest, see TAXATION, 1, 2.

TIME:

Action to revive judgment, commencement, see JUDGMENT, 16.

For certifying statement of facts, see APPEAL AND ERROR, 16.

For taking appeal, see APPEAL AND ERROR, 9, 10.

New trial, extension of, see NEW TRIAL, 3.

Payment of bonds, effect of mistake in city ordinance, see MUNICIPAL CORPORATIONS, 18.

Period of redemption, mutuality of agreement, see PLEDGES, 1.

Process, service by publication, see TAXATION, 14.

TITLE:

See ADVERSE POSSESSION.

Change of as affecting policy, see INSURANCE, 6.

Covenant of title, see COVENANTS.

Delivery of deed after death of grantor, see DEEDS.

Failure of proof, title in third person, see EJECTMENT.

Judgment as bar to assertion of, see JUDGMENT, 1.

Of vendor, failure, recovery of purchase money, see VENDOR AND PURCHASER, 1.

Removal of cloud, see QUIETING TITLE.

Tax titles, to strengthen adverse claim, see TAXATION, 17.

Trial of in forcible entry and detainer, see FORCIBLE ENTRY AND DETAINER.

TORTS:

See DAMAGES, 3; FORCIBLE ENTRY AND DETAINER; NEGLIGENCE; TROVER AND CONVERSION.

Agents, see PRINCIPAL AND AGENT.

Causing death, action for damages, see DEATH, 1.

TOWNS:

Condemnation by, amendment of statute, see STATUTES, 2.

Condemnation of land for public use, see MUNICIPAL CORPORATIONS, 1-7.

TRANSCRIPTS:

Failure to file in time, see APPEAL AND ERROR.

TRESPASS:

See CRIMINAL LAW, 2-4.

Liability for injury to minor, see ELECTRICITY.

Personal injury to child, see NEGLIGENCE, 3.

TRIAL:

- See CONTINUANCE; NEW TRIAL.
 - Comment on evidence in criminal prosecution, see CRIMINAL LAW, 16.
 - Condemnation proceedings, assessing damages, see EMINENT DOMAIN, 1.
 - Construction of argument by counsel, see APPEAL AND ERROR, 35.
 - Cross-examination in criminal prosecution, see CRIMINAL LAW, 17.
 - Division of property on divorce, see DIVORCE, 1, 3.
 - Entry of judgment for failure to answer interrogatories, see JUDGMENT, 13-15.
 - Excessive verdicts, see DAMAGES, 5, 6.
 - Failure to furnish copy of information, waiver by defendants, see CRIMINAL LAW, 5.
 - Harmless error in argument of counsel, see APPEAL AND ERROR, 24.
 - Harmless error on challenge to jury, see JURY, 1.
 - Imposition of terms upon vacation of judgment, see JUDGMENT, 11.
 - Instructions as to damages, see TROVER AND CONVERSION, 2.
 - Instructions as to personal injuries, see MASTER AND SERVANT, 10-12
 - Instructions in action for damages, see DAMAGES, 1, 2.
 - Instructions in criminal prosecutions, see CRIMINAL LAW, 13-16.
 - Law of case, see APPEAL AND ERROR, 38.
 - Mandamus to compel, see MANDAMUS, 6.
 - Power to correct ruling, see COURTS, 1.
 - Production of documentary evidence, see JUDGMENT, 15.
 - Province of jury, harmless error, see APPEAL AND ERROR, 27.
 - Question for jury, directed verdict, see NEGLIGENCE, 3.
 - Reception of evidence, see EVIDENCE.
 - Review of findings on appeal, see APPEAL AND ERROR, 20-22.
1. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requested instructions that are covered in the general charge. *Curtis v. Barber Asphalt Paving Co.*..... 334
 2. TRIAL—INSTRUCTIONS. It is not error to refuse requested instructions that are covered in the general charge. *Hammock v. Tacoma*..... 623
 3. TRIAL—INSTRUCTIONS—ASSUMPTION OF ISSUE—ARGUMENTATIVE AND COMPLICATED. It is not error to refuse requested instructions of extreme length assuming in some places the issue in controversy, as proved, in other respects argumentative, and as a whole complicated and involved. *Sullivan v. Seattle Electric Co.*..... 53
 4. TRIAL—INSTRUCTIONS AS TO ISSUES. It is not error to fail to instruct specifically that the defendant controverted the material facts of the complaint by denials, where it appears that the jury must have so understood the issues. *Schwanger v. McNeeley & Co.* 447

TRIAL—CONTINUED.

5. TRIAL—INSTRUCTIONS. An instruction not pertinent to the issues in the case should not be given. *Rowe v. Whatcom County R. & Light Co.*..... 658
6. TRIAL—FINDINGS OF FACT—SUFFICIENCY AND NECESSITY IN EQUITABLE ACTIONS. Findings of fact and conclusions of law may be stated upon the same page, if segregated, especially in an equitable action. *Peirce v. Wheeler*..... 326
7. TRIAL—VERDICT. The verdict of a jury cannot be assailed on the ground that juries are inclined to be prejudiced in cases between individuals and corporations. *Hanstad v. Canadian Pac. R. Co.*... 505
8. TRIAL—MISCONDUCT OF ATTORNEY. It is prejudicial error for counsel to comment in argument to the jury upon matters eliminated from the trial by the rulings of the court, where such argument was duly objected to at the time, with request that it be withdrawn from the jury, and where the court refused such request and subsequently refused to give properly requested instructions to disregard the same. *Id.*..... 505
9. TRIAL—MISCONDUCT OF COUNSEL. Where the evidence shows plaintiff's counsel was not present at a certain time and place, it is not prejudicial error for the counsel in argument to the jury to state that fact as a conclusion without stating that the "evidence shows" such fact. *Hammock v. Tacoma*..... 623
10. SAME. In an action against a city for personal injuries it is not necessarily prejudicial error, requiring a reversal, for plaintiff's counsel, in replying to comments on the absence of certain witnesses, to state in argument to the jury that they were working for the city and requested not to be called as witnesses, where it does not appear to have in any way affected the result. *Id.*..... 623

TROVER AND CONVERSION:

Action for conversion of goods, see CARRIERS, 1.

1. TROVER—DAMAGES—OUTRAGED FEELINGS. In an action for the conversion of goods, damages by reason of the outraging of feelings cannot be recovered. *Gates v. Bekins*..... 422
2. TROVER—DAMAGES—TRIAL—INSTRUCTIONS. In an action for the conversion of goods and alleged damage to business by reason of the detention, it is reversible error to instruct the jury that they may bring in a verdict for damages in excess of the value of the property when there was no evidence of any other damages. *Gates v. Bekins*..... 422

TRUSTS:

See WILLS, 2.

Capacity of trustee to sue in own name, see PARTIES, 1.

Liability of trustee on sale of assets, see CORPORATIONS, 1-3.

TRUSTS—CONTINUED.

- Right of trustee to cancel stock, see **CORPORATIONS**, 5.
- Subscription by trustee to stock of corporation, sufficiency, see **EMINENT DOMAIN**, 3.
- Transfer of property by insolvent debtor, see **FRAUDULENT CONVEYANCES**, 1-3.
- Vacation of order reappointing trustee, review, see **APPEAL AND ERROR**, 2.

UNDUE INFLUENCE:

- Procuring making of will, see **WILLS**, 1.

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- Courts, see **REMOVAL OF CAUSES**.

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- See **FORCIBLE ENTRY AND DETAINER**.

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- Waiver of defense of, see **APPEAL AND ERROR**, 37.

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- Of default, on decision on appeal, see **APPEAL AND ERROR**, 32.
- Of judgment, see **JUDGMENT**, 3-7, 9-11.
- Of judgment foreclosing mortgage lien, see **EXECUTION**, 1.
- Of tax sale, see **TAXATION**, 6.

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- Between pleading and proof in civil action, see **PLEADING**, 1.

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- Speed of automobiles on streets, see **MUNICIPAL CORPORATIONS**, 26, 27.

VENDOR AND PURCHASER:

- Award of deposit by intervener in action by vendor for purchase money, see **DEPOSIT IN COURT**.
- Deed delivered after death of grantor, see **DEEDS**.
- Joint purchasers, forfeiture, see **TENANCY IN COMMON**.
- Judgment as bar to action of replevin, see **JUDGMENT**, 2.
- Parol evidence of contract, see **EVIDENCE**, 4.
- Purchaser of delinquent property as agent of owner, see **PRINCIPAL AND AGENT**.
- Recovery on breach of conditional bill of sale, see **REPLEVIN**.
- Requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

VENDOR AND PURCHASER—CONTINUED.

Sale of property as forfeiture of conditions of policy, see INSURANCE, 6.

Specific performance of contract, see SPECIFIC PERFORMANCE.

1. VENDOR AND PURCHASER—CONTRACT TO CONVEY—BREACH—TITLE OF VENDOR. A contract to convey land providing that if the title is not good or cannot be made good in thirty days, is broken by the vendor by the institution and pendency of condemnation proceedings brought by a railroad company to appropriate a right of way across the land, and the breach entitles the vendee to a return of earnest money. *Miller v. Calvin Phillips & Co.*..... 226
2. VENDOR AND PURCHASER—CONTRACT TO CONVEY—RESCISSION BY VENDOR—DELAY OF VENDEE. Delay by the vendee to close a sale is not ground for rescission by the vendors, where the delay was caused by the vendors' failure to secure the satisfaction of a mortgage upon the property. *Stevens v. Kittredge.*..... 347
3. VENDOR AND PURCHASER—FRAUD OF VENDOR—RECOVERY OF PURCHASE PRICE. The part owner of land who was induced to sell at a low price through the fraudulent representations of his co-owner as to the amount that is to be obtained through a contemplated sale, is entitled to recover from the purchaser, after such sale, the amount of the unpaid purchase price, to the extent of his portion of the profits. *Lazier v. Cady.*..... 339
4. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—MUTUALITY—PART PAYMENT—TENDER. There is no lack of mutuality upon the part of the vendee, in a contract for the conveyance of real estate, where he has paid part of the purchase money, repeatedly expressed willingness to pay the balance, and tenders the same in court. *Stevens v. Kittredge.*..... 347
5. SAME—HUSBAND AND WIFE—COMMUNITY PROPERTY—AUTHORITY. A husband cannot claim that his wife was not authorized to sell community land, where the contract was made up of telegrams, one of which he answered, a deed was executed by both in accordance with the contract, and both had full knowledge of the pending sale, which was repudiated by the wife and not by the husband. *Id.*..... 347

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Assignment of error as to amount, see APPEAL AND ERROR, 17, 18.
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Meeting of electors, purchase of building site, see SCHOOLS AND SCHOOL DISTRICTS.

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- Of defect in tax judgment, see **TAXATION**, 16.
- Of defective process, see **APPEARANCE**, 1, 2.
- Of defense of usury, see **APPEAL AND ERROR**, 37.
- Of right to copy of information, see **CRIMINAL LAW**, 5.
- Right to appeal, see **APPEAL AND ERROR**, 3.

WAREHOUSEMEN:

1. **WAREHOUSEMEN—STORAGE RECEIPT—PROVISIONS AS TO VALUE—COMPLIANCE WITH CONDITIONS.** A provision in a warehouse receipt exempting the bailee from liability for over twenty-five dollars for loss of the goods unless "the true value of each box contents or thing is herein stated," is sufficiently complied with where the value of the contents is plainly marked on the box at the time of its delivery; and if technically the value was intended to be stated in the receipt, it was the duty of the bailor to have incorporated therein the stated value; hence upon loss, the damages cannot be limited to twenty-five dollars. *Gannon v. Seehorn*..... 87

WARNING:

- Failure to give, injury, see **MASTER AND SERVANT**, 6, 8, 12.

WARRANTS:

- Orders for payment from public funds, see **MUNICIPAL CORPORATIONS**, 14-17.

WARRANTY:

- Covenants of, see **COVENANTS**.

WATERS:

- See **DRAINS; NAVIGABLE WATERS**.
- Construction of canal across lands of settler, see **PUBLIC LANDS**, 1.
- Injury to irrigation dam, see **CRIMINAL LAW**, 2-4.

WILLS:

1. **WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.** A finding of want of testamentary capacity is warranted by the evidence where it appears that the decedent was seventy-eight years of age, that his wife died nine days before, causing him great mental anguish, that he languished physically until his death nine days thereafter, the will being made four days before his death, at night, in the house of the sole devisee, who was not related to him, no mention being made of his children or grandchildren and no disposition made of a small amount of the property excepted from the general devise, and where there was evidence that at the time his mind was wandering, weak and feeble. *In Re Wetmore's Estate*..... 567

WILLS—CONTINUED.

2. WILLS — TRUSTS — CONVEYANCE BY EXECUTORS UNDER POWER OF SALE—CONSIDERATION—SATISFACTION OF DEBT SECURED BY VOID MORTGAGE. Where executors and trustees in a nonintervention will are empowered to sell the real estate without notice, upon such terms as they deem best, but have no power to mortgage it, and convey the property without consideration for the purpose of securing a mortgage, and use the proceeds of the loan to pay debts of the estate and legacies, the mortgagor subsequently reconveying the title, the amount due to the mortgagee, secured by such void mortgage, and the compromise of foreclosure actions, are a sufficient consideration for the sale and conveyance of the real estate to the mortgagee, by the executors, under an agreement for the satisfaction of the debt, with right of redemption reserved to the beneficiaries within a stated time; and such conveyance is authorized by the power of sale contained in the will. *Sprague v. Betz*..... 650

WITNESSES:

- Absence of, as ground for continuance, see CONTINUANCE, 2.
Competency in prosecution for bigamy, see CRIMINAL LAW, 18.
Credibility of, see CRIMINAL LAW, 10.
Experts, see EVIDENCE, 6, 7.
Impeachment in prosecution for rape, see CRIMINAL LAW, 10.
Improper cross-examination, see CRIMINAL LAW, 17.

WRITS:

- See EXECUTION; MANDAMUS; PROCESS; REPLEVIN.

Ex. J. M.
3/7/18

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